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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

JUDY LESKO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. II) 602(a)(38), which provides that all parents, brothers and sisters who live together shall constitute a single filing unit for purposes of the Aid To Families With Dependent Children (AFDC) program, is unconstitutional as violative of the Takings Clause, the Due Process Clause or the Equal Protection component of the Fifth Amendment.

II

PARTIES TO THE PROCEEDING

In addition to those named in the caption, the parties are: Linda Reivitz, Secretary, Wisconsin Department of Health and Social Services; and Georgia Mason, Margaret Ryan, their minor children, and all others similarly situated.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The decision of the district court granting appellees a preliminary injunction and declaring the relevant provision of the Social Security Act unconstitutional (App., *infra*, 1a-18a) is reported at 639 F.Supp. 1152. The amended order of the district court (App., *infra*, 19a-21a), as well as its order granting a stay pending appeal (App., *infra*, 22a-23a), are unreported.

JURISDICTION

The district court's original order was filed on July 16, 1986 (App., *infra*, 18a), and its amended order was filed on August 4, 1986 (App., *infra*, 19a-21a). A notice of appeal to this Court was filed on August 6, 1986 (App., *infra*, 24a-25a). On September 29, 1986, Justice Stevens extended the time for docketing the appeal to and including November 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> [N]or shall any person be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 402(a)(38) of the Social Security Act, 42 U.S.C. (Supp. II) 602(a)(38), provides in pertinent part:

> A State plan for aid and services to needy families with children must—
>
> * * * * *
>
> provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include—
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter) * * *.

STATEMENT

A. Statutory and Regulatory Framework

The statutory and regulatory framework is set forth in our jurisdictional statement in *Bowen* v. *Gilliard,* No. 86-509 (filed Sept. 26, 1986), which presents a question

identical to that here. Congress established the Aid to Families with Dependent Children (AFDC) program in 1935. Social Security Act, 42 U.S.C. (& Supp. II) 601 *et seq.* The program is designed to provide financial assistance to families with needy dependent children. See *Heckler* v. *Turner,* 470 U.S. 184 (1985). A "dependent child" is a needy child who has been deprived of parental care or support by the death, incapacity or "continued absence from the home" of a parent (42 U.S.C. 606(a)).

In order to qualify for AFDC benefits, a family must meet certain standards of financial need, determined by its income and resources. 42 U.S.C. (Supp. II) 602(a). The minimum monetary subsistence levels are established by the states (42 U.S.C. (Supp. II) 602(a)(23)), and the states have " 'broad discretion in determining both the standard of need and the level of benefits.' " *Heckler* v. *Turner,* 470 U.S. at 189 n.3 (quoting *Shea* v. *Vialpando,* 416 U.S. 251, 253 (1974)). A family is generally eligible for AFDC benefits if its countable income is less than the standard of need established by the state. The amount of benefits paid to the family is based upon the difference between the family's income and that standard.

Prior to 1984, the statute contained no requirement that all family members residing together be included in the "filing unit" for AFDC purposes. Prior to 1984, therefore, a family applying for AFDC assistance could have excluded from the filing unit those members with income that, if counted in the eligibility determination, would have reduced the amount of the family's AFDC benefits or would have terminated its eligibility entirely. See 1 Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Prt. 98-169, Deficit Reduction Act of 1984,* at 980 (Comm. Print 1984). Moreover, in anticipation that one of its members was about to receive additional income, a family could have removed that member from the AFDC rolls, thus enabling the remaining family members to continue to qualify for benefits.

In 1984 Congress amended the statute to set forth an explicit requirement that a parent and all siblings who reside with a dependent child be included in the filing unit when a family seeks or receives AFDC benefits. Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, § 2640, 98 Stat. 1145, 42 U.S.C. (Supp. II) 602(a)(38). The Senate Finance Committee explained the purpose of this amendment as follows (*S. Prt. 98-169, supra*, at 980):

> *Present Law*
>
> There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit. For example, a family might choose to exclude a child who is receiving social security or child support payments, if the payments would reduce the family's benefits by an amount greater than the amount payable on behalf of the child.
>
> * * * * *
>
> *Explanation of Provision*
>
> The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any stepbrothers and stepsisters) living with a child who applies for or receives AFDC.* * *
>
> This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole.

The committee estimated that this change would save $455 million during 1984-1987 (*id.* at 981). See 130 Cong. Rec. S4099 (daily ed. Apr. 9, 1984) (remarks of Sen. Dole).

This statutory change reflected Congress's recognition that a family that includes a member with separate income is less needy than a comparable family in which no member has any (or as much) such income. Thus, under the law as amended in 1984, all persons listed in the DEFRA amendment must be included in the filing unit when a family applies for AFDC, and the income received by all such persons must be considered in determining the family's eligibility for benefits, and, if the family is eligible, the level of benefits that it will receive.[1]

In amending the statute in 1984, Congress established a slightly different scheme where a child's separate income is obtained in the form of child-support payments. The effect of this variation was to mitigate the impact of the newly-redefined filing unit. Since 1975, the AFDC program has required, as a condition of eligibility, that an applicant assign to the state any accrued right to child-support payments. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(c)(5)(C), 88 Stat. 2359, 42 U.S.C. (Supp. II) 602(a)(26)(A); see *Sorenson* v. *Secretary of the Treasury*, No. 84-1686 (Apr. 22, 1986), slip op. 1-2. That assignment provision operated only when a family chose to include in the filing unit the child who received the support payments.[2] Had Congress in 1984 simply

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[1] To implement the DEFRA amendment, the Secretary of HHS promulgated the following regulation (45 C.F.R. 206.10(a)(1)(vii)):

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and
>
> (B) Any blood-related or adoptive brother or sister.

[2] This typically occurred when the support payment was smaller than the increase in AFDC benefits that the family would realize by applying as a larger filing unit. It also ocurred when non-custodial

added the requirement, without more, that a child with child-support income be included in the filing unit, the joint operation of DEFRA and the pre-existing assignment provision would have produced a procedure in which the child support was required to be assigned to the state, with the family receiving a somewhat larger AFDC payment to reflect the larger filing unit. Congress recognized, however, that the child support thus assigned might sometimes be greater than the marginal increase in AFDC benefits thus obtained, resulting in a possible economic disadvantage to the family. To alleviate that potential disadvantage, Congress added a companion provision to the statute in 1984. Pub. L. No. 98-369, § 2640(b)(1), 98 Stat. 1145, 42 U.S.C. (Supp. II) 675(b)(1). That section provides that the first $50 of any monthly child-support payment collected by the state pursuant to the assignment provision is to be paid by the state directly to the child's caretaker relative, and that this $50 is to be disregarded in determining the family's AFDC eligibility and benefits.

B. Proceedings In This Case

1. Appellees are a class of mothers and children who comprise families that receive AFDC benefits. The children fall into two groups. The first group consists of "needy children" on whose behalf the AFDC benefits are paid. The second group consists of siblings who receive child-support payments from a non-custodial parent or who receive child's insurance benefits on account of a deceased parent under Title II of the Social Security Act, 42 U.S.C. (& Supp. II) 402(d). For the sake of convenience, we will use the term "appellees" to refer to the appellee-mothers exclusively.

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parents were delinquent or irregular in making child-support payments and the family concluded that it could maximize total income by including the child in the filing unit.

Appellees filed this state-wide class action in the United States District Court for the Eastern District of Wisconsin against the Secretary and the state officials responsible for administering the AFDC program in Wisconsin. The complaint challenged the Secretary's regulations implementing the DEFRA filing-unit provision and the State's administrative practice that conforms to those regulations. See App., *infra,* 5a, 10a. Appellees sought a preliminary injunction to prevent defendants from requiring that children who receive income be included in the AFDC filing unit and to prevent defendants from counting such income in calculating AFDC benefits. Appellees also sought to enjoin defendants from requiring children who receive child-support payments to assign that income to the state as a condition of AFDC eligibility under 42 U.S.C. (Supp. II) 602(a)(26)(A). See Complaint 17.

2. On July 16, 1986, the district court issued its decision granting appellees' motions for class certification and for a preliminary injunction (App., *infra,* 1a-18a). The court concluded that DEFRA's "legislative history, read as a whole, shows that it was Congress' intent to require state authorities administering the AFDC program to include the child support and Title II benefits of co-resident children as available to their AFDC half-siblings" (App., *infra,* 11a). The court therefore found it necessary (*ibid.*) to "consider the constitutional arguments plaintiffs make against § 2640(a)" of DEFRA.[3]

The court then proceeded to hold that the DEFRA filing-unit provision "violates the plaintiffs' Fifth and Fourteenth Amendment rights to due process, just com-

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[3] Actually, appellees in their complaint had directed their constitutional objections to the federal regulation and to the state's administrative practice, and not specifically to the statute itself. See page 7, *supra;* Complaint 17. The district court, however, viewed the complaint as at least implicitly challenging the constitutionality of the statute as well. See App., *infra,* 11a.

pensation and equal protection" (App., *infra,* 11a). Turning first to procedural due process, the court stated that family members have a protected property interest in the continued receipt of their current level of AFDC benefits, and that the needy children's siblings have a protected property interest in their child support or Title II payments. Employing a balancing test derived from *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), the court said that the risk that appellees and their children would be erroneously deprived of such property outweighed the burdens on the government of employing additional procedures. "To deprive the 'other children' who reside with AFDC children of their child support payments or Title II benefits which they use for special health needs," the court suggested, "is one of many imaginable errors implicit in such processless deprivations" (App., *infra,* 12a). The court stated (*ibid.*) that "plaintiffs are entitled to at least enough process to prevent egregious errors of this kind," and it suggested that such process should take the form of "a predeprivation hearing" at which AFDC families could "show that the reduction of AFDC benefits pursuant to § 2640(a) creates undue hardship for them" (App., *infra,* 11a, 13a).

The court next concluded that the effect of the DEFRA filing-unit rule, as applied to siblings with independent sources of income, is to deprive them of private property without just compensation, on the theory that such children are "forced to contribute to the support of that family with their own funds" and thus "forced to assume a public burden" (App., *infra,* 13a-14a). The court also held that children receiving child-support payments or Title II benefits who are affected by the filing-unit rule are denied equal protection because "Congress cannot rationally impose this kind of deprivation on a class of children defined by the indigency of their half-siblings" (*id.* at 14a). The court regarded this treatment as irrational because under

Wisconsin law "there is no duty of support running from a minor child to his half-sibling," so that the statutory scheme assertedly placed the "public burden" of supporting needy children on their housemates (*id.* at 13a-14a).

In its accompanying order, the court preliminarily enjoined defendants from including in a filing unit, as a condition of AFDC eligibility, minor children who receive Title II benefits, child support or other income (App., *infra,* 16a-17a). The court also enjoined defendants from "assuming that Title II or child support payments of a child who resides with half-siblings who receive AFDC benefits are available to meet the needs of such AFDC children" (*id.* at 17a). Finally, the court enjoined the Secretary and the state defendants from requiring the assignment of child-support income to the state as a condition of AFDC eligibility, and from "denying, reducing or terminating AFDC benefits on the basis of defendants' rule and policy promulgated pursuant to § 2640(a) of [DEFRA]" (App., *infra,* 18a).[4]

THE QUESTION IS SUBSTANTIAL

The question here is identical to that presented in *Bowen* v. *Gilliard,* No. 86-509 (filed Sept. 26, 1986). Separate jurisdictional statements have also been filed by the state defendants in each case. *Reivitz* v. *Lesko,* No. 86-415 (filed Sept. 12, 1986); *Kirk* v. *Gilliard,* No. 86-564 (filed Sept. 29, 1986). In each case, a district court, relying on essentially the same theories, has invalidated a key provision of the Social Security Act that was designed to

[4] The court initially directed that its order be stayed pending appeal (App., *infra,* 17a). In its amended order filed August 4, 1986, however, the court decided that plaintiffs were entitled to immediate relief and lifted the stay (*id.* at 20a-21a). Ten days later, the court again reversed itself and granted the State's motion for a stay pending appeal to this Court (*id.* at 22a-23a).

ameliorate what Congress perceived as a serious flaw in the AFDC eligibility scheme. Those decisions, invalidating a federal statute on grounds of repugnancy to the Constitution, clearly present a substantial federal question meriting this Court's review.[5]

This case and *Gilliard* arise in somewhat different factual and procedural contexts. The decision below was rendered on a motion for a preliminary injunction, and, although the district court plainly declared the statute unconstitutional, appellees' complaint explicitly challenged the constitutionality only of the regulations. On the other hand, the instant case presents a somewhat more comprehensive factual picture, since the families here include children who receive, not only child-support payments (as in *Gilliard*), but also Title II social security benefits. Since the mechanics of the statute's application differ slightly depending on the type of payments involved, we think that the instant case represents on balance a somewhat better vehicle for resolving the important constitutional questions presented.

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[5] In our jurisdictional statement (at 12 n.3) in *Bowen* v. *Gilliard*, No. 86-509, we canvassed the results of litigation concerning the DEFRA filing-unit rule in the district courts generally. Subsequent to the docketing of that jurisdictional statement, the United States District Court for the Northern District of Georgia issued an opinion invalidating the DEFRA filing-unit rule on some of the same constitutional grounds at issue here. *Baldwin* v. *Ledbetter*, No. C85-4340A (filed Oct. 17, 1986). We intend to file a jurisdictional statement in that case.

CONCLUSION

Probable jurisdiction should be noted, and the case should be consolidated for argument with *Reivitz* v. *Lesko*, No. 86-415.[6]

Respectfully submitted.

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NOVEMBER 1986

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[6] Alternatively, the Court may wish to consider noting probable jurisdiction of the Secretary's appeals here and in *Bowen* v. *Gilliard*, No. 86-509, consolidating those two appeals, and holding the states' appeals in both cases pending disposition herein.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

C.A. No. 85-C-1600

JUDY LESKO, GEORGIA MASON, AND MARGARET RYAN, ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN, AND OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

OTIS R. BOWEN, M.D.,* INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND LINDA REIVITZ, INDIVIDUALLY AND IN HER CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, AND THEIR AGENTS, EMPLOYEES, SUCCESSORS IN OFFICE, ASSISTANTS AND ALL OTHERS ACTING IN CONCERT OR COOPERATION WITH THEM OR AT THEIR DIRECTION OR UNDER THEIR CONTROL, DEFENDANTS.

[Filed July 16, 1986]

FINDINGS OF A FACT, CONCLUSIONS OF LAW, AND ORDER

This is a class action to restore AFDC benefits by enjoining the defendants from including half-siblings' non-AFDC income in the family income of AFDC beneficiaries. The result of that inclusion is to reduce the AFDC

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*Otis R. Bowen, M.D., succeeded Margaret M. Heckler as United States Secretary of Health and Human Services on December 13, 1985. Pursuant to Fed. R. Civ. Proc. 25(d)(1) he is hereby substituted as the defendant in this action.

benefits available for certain families under the questionable assumption that other funds are available, and/or to require a child with non-AFDC income such as child support, to use his funds to support his half-siblings. For the reasons stated below, plaintiffs' motion for class certification and a preliminary injunction will be granted.

The plaintiffs are mothers and two classes of children: those who seek to have the defendants restore their AFDC payments ("AFDC children"); and those other children, who have money of their own or who are receiving support payments from their fathers either directly or through social security survivor payments ("other children"), and who live with the AFDC children. These reductions came about because the Federal government decided to include the other children's income as part of the "family" income in determining the AFDC eligibility of the mothers and the AFDC children.

This case arises under the laws of the United States. Jurisdiction is conferred by 28 U.S.C. § 1331.

A hearing on the plaintiffs' motions for class certification and for a preliminary injunction was held on January 16, 1986.

FINDINGS OF FACT

The named plaintiffs are mothers and their children: some of these children receive grants from the Aid to Families with Dependent Children program ("AFDC"), 28 U.S.C. §§ 601 *et seq.* (hereinafter "AFDC children"), and some of these children receive either child support from their fathers, benefits under Title II of Social Security Act, 42 U.S.C. §§ 301 *et seq.* ("Title II"), Old Age, Survivor and Disability Insurance, or have their own property. The non-AFDC children will hereinafter be referred to as the "other children."

The mothers and all of the children have asked for class certification and for a preliminary injunction preventing defendants from requiring the mothers to include within their AFDC filing units the "other children," and from withholding AFDC benefits pursuant to defendants' rules and policies implementing § 2640(a) of the Deficit Reduction Act of 1984 ("DEFRA"), 42 U.S.C. § 602(a)(38); and from assigning child support income to the State of Wisconsin pursuant to this rule and policy.

Defendant Otis R. Bowen, M.D., is the Secretary of the United States Department of Health and Human Services and in that capacity has the duty to administer and promulgate regulations to implement the AFDC program and the Social Security Old-Age, Survivors, and Disability Insurance program 42 U.S.C. §§ 401 *et seq.*

Defendant Linda Reivitz is the Secretary of the State of Wisconsin Department of Health and Social Services and in that capacity is charged with the supervision of the administration of the AFDC program in Wisconsin.

AFDC is a cooperative federal and state program authorized under Title IV of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*. The purpose of the program is to provide financial aid to needy children who are deprived of parental support or care by reason of the death, continued absence from the home, unemployment or incapacity of a parent. 42 U.S.C. §§ 606(a) and 607. The State of Wisconsin participates in the AFDC program and has adopted a state disbursement plan in accordance with the requirements of 42 U.S.C. § 602(a).

The federal law under consideration provides that in determining the need of applicants for AFDC the state agency administering the AFDC program must "take into consideration any other income and resources of any child or [cohabitant] relative" of those seeking aid under the AFDC program. 42 U.S.C. § 602(a)(7)(A). All income that is "actually available" to meet the needs of the AFDC applicant child, including any income which such AFDC child "has the legal ability" to make available for his or her

support or maintenance, must be counted in determining his eligibility for and the amount of AFDC benefits he will receive. 45 C.F.R. § 233.20(a)(3)(ii)(D). Wisconsin has established, pursuant to the requirements of 42 U.S.C. §§ 651 *et seq.*, the Office of Child Support, which obtains and enforces child support orders issued by the Wisconsin courts.

Prior to October 1, 1984, AFDC applicants had the option of excluding from the filing unit any family member in the household if the excluded member had no legal duty to support the applicants. Any income or resources that the other children had would not be counted in determining the amount of AFDC benefits granted to the applicants.

Effective October 1, 1984, 42 U.S.C. § 602(a) was amended by § 2640(a) of DEFRA. The amendment requires the states participating in the AFDC program to amend their state plans to provide as follows:

> [I]n making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include:
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding sections 405(j) of this title, in the case of benefits provided under subchapter II of this chapter). . .

42 U.S.C. § 602(a)(38).

Pursuant to the statutory amendments made by DEFRA, defendant Secretary Heckler promulgated an interim rule which provides as follows.

> For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance.
>
> (A) Any natural or adoptive parent, or step-parent (in the case of States with laws of general applicability); and
>
> (A) Any blood-related or adoptive brother or sister.

Amendments to Part 206, 49 Fed. Reg. 35599 (September 10, 1984), now codified at 45 C.F.R. § 206.10(a)(1)(vii).

On July 1, 1985, defendant Secretary Reivitz issued an AFDC Handbook Release which directs all county social service departments to include within the AFDC group any minor brothers and sisters who are dependent and who live with an AFDC child who is applying for or receiving AFDC unless they fall within one of the enumerated mandatory exclusions. Children who receive either child support or Title II benefits do not fall within the listed exclusions.

Title II of the Social Security Act of 1935, as amended, provides for Old-Age, Survivor, and Disability Insurance benefits to insured workers and their dependents. If a worker is insured within the meaning of the Social Security Act, and then dies, becomes disabled or retires, his dependent children are entitled to receive monthly insurance benefits based on the amount of the insured worker's contribution to the system. 42 U.S.C. §§ 401 *et seq.* These benefits are generally paid to a "representative payee" who has the responsibility to use the benefits solely for the child's use and benefit. 42 U.S.C. § 408(e).

Wisconsin child support law provides that in determining the appropriate amount of child support a court shall consider the financial resources of the child, the parents'

ability to pay and the standard of living the child would have enjoyed if the parents were not separated. Wis. Stats. § 767.25(1m). Wisconsin law further provides that parents have a duty to support only their own natural and adoptive children. In this respect Wisconsin child support law differs from Wisconsin law implementing the AFDC program with respect to the methods and aims of determining appropriate support levels for children. "Need" for the purposes of the AFDC program is determined by the state and represents a "minimum subsistence" level. A state's standard of need is used to determine who is eligible for benefits and the amount of an AFDC grant. Wisconsin's current AFDC standard is 85% of what has been determined to be a minimum subsistence level. Wis. Stats. § 49.19(11)(a)(1).

Plaintiff Judy A. Lesko resides in Wisconsin with her two minor children. Her son receives $341 per month in Title II benefits due to the death of his father. Until September 1, 1985, Ms. Lesko received in adjusted AFDC grant of $417 per month. This combined with the Title II benefits amounted to $758 per month. Ms. Lesko is now required to include her son in her family's AFDC filing unit and this has the effect of increasing the size of the unit and, thus, increasing her family's adjusted grant to $508 from $417 per month; but her son's Title II benefits are subtracted from this amount. Thus, beginning September 1, 1985, her AFDC grant was reduced to $167 per month. The monthly income for her family of three has in this way been reduced from $758 to $508. Ms. Lesko's family's monthly expenses are approximately $790.

Plaintiff Shirley Carr, resides in Wisconsin with her two minor daughters and an 18 year old son. Until September 1, 1985, Ms. Carr's family's AFDC grant was $453 per month. One of her minor daughters has received $450 per month for the last 13 years under Title II because her father died. Thus, the family's total monthly income has been $903. In August 1985, Ms. Carr received notice from the Milwaukee County Department of Social Services that

beginning September 1, 1985, she would be required to include her Title II daughter in her AFDC filing unit and that her daughter's Title II benefits would be deducted from her AFDC grant. Ms. Carr's AFDC grant now totals $544 per month, but her daughter's $450 per month in Title II benefits are deducted, thus reducing her AFDC grant to $94 per month. Thus, the monthly income for her family of four has gone from $903 down to $544.

Ms. Carr's family's monthly budget includes: $380 for rent, $75 for food beyond her allotment in food stamps, $100-$175 for natural gas, $27 for the telephone, $50 for clothing, $50 for transportation, $25 for laundry and $20 for miscellaneous expenses, for a total monthly budget of approximately $725 to $800. The family's car and washing machine have been repossessed; the family has had to sell their television and some furniture. Ms. Carr is behind in her payments on her gas bill.

Plaintiff Georgia Mason, resides in Wisconsin with her two children. Her son receives $478 per month in Title II benefits due to his father's death. Excluding this son from the AFDC filing unit, Ms. Mason received $488 per month in AFDC benefits, for a family total of $966. Including him in the AFDC unit and deducting his Title II income reduces the AFDC grant to $49 per month. Monthly income for this family of three has, thus, declined from $966 to $527. In the past Ms. Mason regularly used her son's Title II income to pay for treatment of his emotional and behavioral problems.

Plaintiff Margaret Ryan, resides in Wisconsin with her four children. Her two oldest children receive $500 per month in child support payments from their father. Ms. Ryan and her two other children were eligible for an AFDC grant of $544 per month bringing the family's total monthly income to $1,044. Under the new rules the family's AFDC grant over and above child support now amounts to $295, thus reducing the monthly income for this family of five from $1,044 to $795 per month. In the

past Ms. Ryan has regularly used her elder children's child support income to pay for treatment of their progressive hearing loss.

During the last five months of 1985, (since the defendants have implemented 42 U.S.C. § 602(a)(38)) over 3,500 families with one or more child receiving child support or Title II payments have begun to receive AFDC benefits in Wisconsin. These families have had or will have their AFDC benefits reduced because of the inclusion of the "other children's" income in the AFDC filing unit.

CONCLUSIONS OF LAW

I. CLASS CERTIFICATION

Plaintiffs have moved for certification of a class action pursuant to Fed. R. Civ. P. 23 and this motion will be granted, because: the defendants' rule and policy are applicable to the entire class; the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to class members; the claims of the plaintiffs are typical of the claims of the members of the class as a whole; and the plaintiffs will fairly and more than adequately protect the interests of the class. Thus, plaintiffs have met the requirements of Rule 23.

Defendants argue that because identical relief can be afforded without class certification, certification is unnecessary in this case. *Martinez v. Richardson,* 472 F.2d 1121, 1127 (10th Cir. 1973). However, because members of the class may be entitled to individual notification of the Court's judgment, and because such relief cannot be granted unless the class is certified, the Court will certify the class.

II. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The test for whether a district court should grant a preliminary injunction requires the Court to consider four factors.

> (1) [W]hether the plaintiff has an adequate remedy at law or will be irreparably harmed if the injunction is not granted; (2) whether the injury threatened to plaintiff outweighs the harm defendant will suffer if the injunction is granted; (3) whether plaintiff has a reasonable likelihood of success on the merits; and (4) whether granting the injunction will disserve the public interest.

Technical Pub. Co. v. Lebhar-Friedman, Inc., 729 F.2d 1139, 1138 (7th Cir. 1984). Judge Posner of the United States Court of Appeals for the Seventh Circuit has summarized and restated the four-factor test in two recent cases: *Roland Machinery v. Dresser Industries,* 749 F.2d 380 (7th Cir. 1984), and *American Hospital Supply Corporation v. Hospital Products Limited*, 780 F.2d 589 (7th Cir. 1986). The Court must consider the balance of irreparable harm in the light of the probability that the plaintiff will succeed on the merits. The rule of *American Hospital Supply* permits a Court to grant a motion for a preliminary injunction only

> if the harm to the plaintiff if the injunction is denied, multiplied by the probability that the denial would be an error (that the plaintiff, in other words, will win at trial), exceeds the harm to the defendant if the injuncton is granted, multiplied by the probability that granting the injunction would be an error.

American Hospital Supply, 780 F.2d at 593. Any harm the public interest might suffer due to the Court's error is to be added to harm plaintiff or defendant would suffer, as the case may be. *Id.*

A. *Irreparable Harm to the Plaintiffs*

The plaintiffs will suffer irreparable harm if they are forced to subsist at the income level to which the defendants' rule and policy would reduce them, a level which has been determined by Wisconsin to be 85% of subsistence. This harm is no less irreparable because it is also inflicted on countless other AFDC families who do not have members receiving child support payments or Title II benefits.

Moreover, several of the "other children" will also suffer irreparable harm if they are forced to spend money currently used to pay for the treatment of their special medical and emotional problems on the general subsistence of the family unit. These "other children" are being deprived of their assets without due process of law, without any determination that the money is actually available for redistribution. They are also required to use their own funds to support people, such as their half-siblings, while children similarly situated are not so required, thus denying them equal protection of the laws.

B. *The Balance of Irreparable Harm*

Irreparable harm to the health and emotional well-being of the children here is substantial. The cost to the defendants of delaying further enforcement of the regulations involved and of temporarily restoring the plaintiffs' AFDC grants to their former level is not substantial and is irreparable only in the sense that such cost will not be reimbursed by plaintiffs. The balance of irreparable harm, then, tilts heavily toward plaintiffs.

C. *Plaintiffs' Likelihood of Success*

The plaintiffs argue that the administrative regulations implementing § 2640(a) of DEFRA are inconsistent with DEFRA and with other provisions of the Social Security Act and the AFDC program. In the alternative, plaintiffs argue that the law is unconstitutional. Plaintiffs are likely

to prevail on the merits. Although the challenged regulations appear to implement Congress' intent, the law itself unconstitutionally deprives the "other children" of their property without due process, denies them equal protection and just compensation, and unconstitutionally conditions these families' receipt of AFDC benefits on a classification which bears no rational relationship to a legitimate legislative objective.

The legislative history, read as a whole, shows that it was Congress' intent to require state authorities administering the AFDC program to include the child support and Title II benefits of co-resident children as available to their AFDC half-siblings. The Court must, therefore, consider the constitutional agruments plaintiffs make against § 2640(a).

The Court finds that application of § 2640(a) of DEFRA violates the plaintiffs' Fifth and Fourteenth Amendment rights to due process, just compensation and equal protection.

Each of the plaintiffs' is denied due process. Each has a property interest in their AFDC entitlement, child support, Title II benefits, or other property. Yet that property is taken or reduced by the government, and they are given no opportunity, either before or after the taking, to show that the reduction of AFDC benefits pursuant to § 2640(a) creates undue hardship for them.

The threshold question in a due process case is whether the plaintiffs have a constitutionally protected interest in property. The "other children," who have their own money, receive child support or Title II benefits, clearly have such interests. Recipients of public assistance also have a constitutionally protected interest in the continued receipt of those benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970). Thus, the plaintiff mothers and children who receive AFDC benefits also have property interests of which they cannot be deprived without due process. There

are here, moreover, other interests of which the Court is mindful: (1) the interest, or expectation, of fathers making payments pursuant to a court decree requiring them to support their children that the money they pay will be used to satisfy their legal support obligation; (2) the interest, or expectation, of fathers now disabled or deceased that contributions they made to the Social Security Old-Age, Survivor, and Disability Insurance program would entitle their children to Title II benefits in the case of their fathers' death or disability.

The process due to persons possessing property interests such as these is determined by balancing these interests against those of the government in light of the risk of an erroneous deprivation of the plaintiffs' interests through the procedures used and in light of the probable value of any additional procedures in reducing that risk. *Mathews v. Eldridge*, 425 U.S. 319 (1976). This balance tips very sharply in plaintiffs' favor. The preliminary balance of interests, like the balance of irreparable harm considered above, favors the plaintiffs. This becomes starkly apparent in light of the probable reduction in the risk of erroneous deprivation is plaintiffs are provided more procedural protection. Currently no procedure is employed before or after plaintiffs are deprived of their property interests. To deprive the "other children" who reside with AFDC children of their child support payments or Title II benefits which they use for special health needs is one of many imaginable errors implicit in such processless deprivations. The risk of such errors now is 100%. Even assuming the propriety of replacing part of an AFDC family's benefits with the Title II or child support of any half-siblings who live with that family, plaintiffs are entitled to at least enough process to prevent egregious errors of this kind.

Defendants argue that a pre-deprivation hearing regarding the availability for general family support of the Title II benefits and child support would be impractical because virtually all of the necessary evidence is in the plaintiffs' possession. The Court knows of no reason why plaintiffs may not be required to make a showing of the unavailability of such funds for the general support of the AFDC filing unit. Two families appear to be able to make such a showing here on the basis of the "special" needs of the children receiving child support or Title II benefits. There may well be other reasons why child support or Title II benefits may be shown to be unavailable to supplement a reduced AFDC grant.

Moreover, the effect of § 2640(a) is to deprive the "other children," those who receive support payments, Title II benefits, or have other income of their own, of property without just compensation. These "other children," simply because they have the bad luck to live with an AFDC family, are forced to contribute to the support of that family with their own funds, and without compensation. The "other children," who receive child support payments or Title II benefits, are also denied equal protection. If by enacting § 2640(a) Congress intended to deprive those children of their property merely because they live in households with AFDC children, then the "other children" are distinguished for no rational reason from property-owning children who have no AFDC half-siblings. The distinction is irrational because, under Wisconsin law, there is no duty of support running from a minor child to his half-sibling. If there is no one who has both the legal duty and the financial capacity to support a child the public assumes the burden of that child's support through the AFDC program. Section 2640(a) transfers that burden substantially to those "other children" whose mothers happen to have additional children who are now receiving AFDC benefits. Thus, the

child who receives child support or Title II benefits and who has AFDC half-siblings is forced to assume a public burden which the child receiving the same benefits but who has no such half-sibling does not share.

The classification is also overinclusive as can be seen from its likely effect on three of the plaintiff children here, who rely on their child support or Title II income to purchase health care that would otherwise be unavailable. These three children either will be deprived of needed heath care or their half-siblings will be required to forego a portion of their subsistence, which is already only 85% of what Wisconsin has determined to be minimum. Congress cannot rationally impose this kind of deprivation on a class of children defined by the indigency of their half-siblings.

Defendants cite *Califano v. Jobst,* 434 U.S. 47, 55 (1977), and *Schweiker v. Hogan*, 457 U.S. 569, 589 (1982), for the proposition that the validity of a broad legislative classification of this sort may not be properly judged by focusing on "selected, atypical examples." But it is difficult to believe that Congress could rationally find that the incidence of special social and health care needs is so low among children who are either Title II or child support recipients as to permit invasion of their property rights and indiscriminate reductions of their subsistence and health care merely because they have half-siblings who receive benefits under the AFDC program.

Defendants contend that the plaintiff children receiving child support or Title II benefits are not, as a legal matter, deprived of anything by § 2640(a). Rather, they argue, § 2640(a) merely limits the family's AFDC grant to an amount that is sufficient, when added to funds available to one family member, to provide the family as a whole with means for its subsistence. At oral argument defendants also suggested that plaintiffs had the additional

options of not applying for AFDC benefits or breaking up their households. This is pure sophistry. Those are not real options.

But even were the Court to accept this harsh and formalistic solution to the equal protection rights of children receiving child support and Title II benefits, the equal protections rights of their AFDC half-siblings would remain. AFDC grants to these children are being dramatically reduced simply because there are funds available to their half-siblings, despite the fact that the AFDC children have no legal claim to such funds. AFDC children whose mothers have no "other children" receive full AFDC grants.

D. *The Public Interest*

The public interest is implicated in a dispute involving welfare and family policies and their impact on the fisc, and the public interest lays clearly on the side of the plaintiffs.

The principal public interest advanced by the government is that the size of the deficit will be reduced if we deprive these "other children" of their property by, in effect, forcing them to share their property with the other impoverished members of their household. The popular consensus is that the public would benefit from a reduction in the deficit, although the individuals that make up the public can't seem to agree whose programs should be cut or abolished to reduce the size of the deficit. Nor is there any clear agreement among economists or politicians that deficits are harmful to the public interest, though that view has certainly emerged as the more popular in recent public discourse, if not in governmental action.

In any event, the question of the effect of deficits upon the public is not before the court, but rather, how a government with the stated purpose of reducing that deficit may act, and what the effect would be on the public interest if this court were to enjoin the defendants from

carrying out the regulations at issue. Assuming the public has an interest in reduced deficits, the court finds that the amounts of money at issue here are, in light of the size of the deficit, *de minimus*, and that the harm to the public and the fisc if plaintiffs prevail is very small.

The public interest will be harmed if the regulations at issue are utilized. Fathers who pay child support, people who have contributed to social security, and people who provide for their children through inheritance of trusts had, or have, the justified expectation that the money intended for their offspring will go to those children, and to those children alone. It does damage to the rightful expectations of these providers, the children, and their mothers for the government to interfere with these property rights.

In addition, the program randomly punishes AFDC children, or reduces their benefits, if they happen to live in a household with "other children" who have some other source of funds. Children who happen to have some other source of income but live with a family on AFDC are similarly punished. The government's suggestion that families in such a situation have the option of breaking up the family or not applying for AFDC reveals the difficult choices that plaintiffs face. The potentially divisive effects of such a plan, dividing child against child, are apparent. It is difficult to see how the public interest in the family would be served by such a system.

Finally, the mark of a civilized society is best reflected in how it treats those in its midst who are the worst off. The public has an interest in providing our nation's children with at least a subsistence level of support.

ORDER

IT IS HEREBY ORDERED that pursuant to Fed. R. Civ. Pro. 23(c)(1) this action is certified as a class action under Rule 23(b)(2) on behalf of the following class:

(a) All needy dependent children who live with half-siblings receiving Title II or child support pay-

ments who have been denied AFDC or whose AFDC benefits have been, are being or will be reduced or terminated because their half-siblings are included in the family's AFDC grant and the Title II or child support payments are considered income available to the entire family;

(b) All children who receive Title II or child support payments who do not need AFDC benefits but live with half-siblings who are needy dependent persons eligible for AFDC; and

(c) All parents or other caretakers of needy dependent children who have within their families children who receive Title II or child support payments and who are being required to apply for AFDC for all children in the household.

IT IS FURTHER ORDERED that the terms of this order will be stayed pending resolution of any appeals.

IT IS FURTHER ORDERED that the defendants Secretary Otis R. Bowen, M.D., and Secretary Linda Reivitz and their agents, employees, successors in office, assistants and all others acting in concert or cooperation with them or at their direction or under their control are preliminarily enjoined from requiring that anyone applying for or receiving AFDC benefits must, as a condition of application for and continued receipt of benefits, include minor children residing in the home who receive Title II or child support payment or have other income.

IT IS FURTHER ORDERED that defendants are preliminarily enjoined from assuming that Title II or child support payments of a child who resides with half-siblings who receive AFDC benefits are available to meet the needs of such AFDC children.

IT IS FURTHER ORDERED that defendants are preliminarily enjoined from requiring that the child support payments of a child be assigned to the State as reimbursement for AFDC paid to AFDC children.

IT IS FURTHER ORDERED that defendants are preliminarily enjoined from denying, reducing or terminating AFDC benefits on the basis of defendants' rule and policy promulgated pursuant to § 2640(a) of the Deficit Reduction Act of 1984.

IT IS FURTHER ORDERED that defendants identify and provide notice to all members of the plaintiff class regarding the requirements of this order and the administrative remedies available to them.

IT IS FURTHER ORDERED that defendants notify the directors of the county departments of social services of the requirements of this order.

Dated at Milwaukee, Wisconsin, this 16th day of July, 1986.

BY THE COURT:

/s/ JOHN W. REYNOLDS

John W. Reynolds
Chief Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

C.A. No. 85-C-1600

JUDY LESKO, GEORGIA MASON, AND MARGARET RYAN, ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN, AND OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

OTIS R. BOWEN, M.D., INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND LINDA REIVITZ, INDIVIDUALLY AND IN HER CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, AND THEIR AGENTS, EMPLOYEES, SUCCESSORS IN OFFICE, ASSISTANTS AND ALL OTHERS ACTING IN CONCERT OR COOPERATION WITH THEM OR AT THEIR DIRECTION OR UNDER THEIR CONTROL, DEFENDANTS.

[Filed Aug. 4, 1986]

AMENDED ORDER

On July 16, 1986, the court granted plaintiffs' motion for class certification and a preliminary injunction but stayed the effect of that order pending any appeals. The stay was premised on the assumption that the government would immediately appeal the court's order. The defendants have not filed a notice of appeal, most likely because they are content with the status quo. Absent an appeal the effect of the court's stay is to deny the plaintiffs the relief to which this court found they were entitled.

Given this state of affairs and the fact that the plaintiffs will continue to be irreparably injured if the stay is not lifted, the court will amend its July 16, 1986, order. The stay will be lifted and the preliminary injunction shall go into effect immediately.

AMENDED ORDER

IT IS HEREBY ORDERED that pursuant to Fed. R. Civ. Pro. 23(c)(1) this action is certified as a class action under Rule 23(b)(2) on behalf of the following class:

(a) All needy dependent children who live with half-siblings receiving Title II or child support payments who have been denied AFDC or whose AFDC benefits have been, are being or will be reduced or terminated because their half-siblings are included in the family's AFDC grant and the Title II or child support payments are considered income available to the entire family;

(b) All children who receive Title II or child support payments who do not need AFDC benefits but live with half-siblings who are needy dependent persons eligible for AFDC; and

(c) All parents or other caretakers of needy dependent children who have within their families children who receive Title II or child support payments and who are being required to apply for AFDC for all children in the household.

IT IS FURTHER ORDERED that defendants Secretary Otis R. Bowen, M.D., and Secretary Linda Reivitz and their agents, employees, successors in office, assistants and all others acting in concert or cooperation with them or at their direction or under their control are preliminarily enjoined from requiring that anyone applying for or receiving AFDC benefits must, as a condition of applica-

tion for and continued receipt of benefits, include minor children residing in the home who receive Title II or child support payments or have other income.

IT IS FURTHER ORDERED that defendants are preliminarily enjoined from assuming that Title II or child support payments of a child who resides with half-siblings who receive AFDC benefits are available to meet the needs of such AFDC children.

IT IS FURTHER ORDERED that defendants are preliminarily enjoined from requiring that the child support payments of a child be assigned to the State as reimbursement for AFDC paid to AFDC children.

IT IS FURTHER ORDERED that defendants are preliminarily enjoined from denying, reducing or terminating AFDC benefits on the basis of defendants' rule and policy promulgated pursuant to § 2640(a) of the Deficit Reduction Act of 1984.

IT IS FURTHER ORDERED that defendants identify and provide notice to all members of the plaintiff class regarding the requirements of this order and the administrative remedies available to them.

IT IS FURTHER ORDERED that defendants notify the directors of the county departments of social services of the requirements of this order.

Dated at Milwaukee, Wisconsin, this 4th day of Aug., 1986.

BY THE COURT:

/s/ JOHN W. REYNOLDS

John W. Reynolds
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

C.A. No. 85-C-1600

JUDY LESKO, GEORGIA MASON, AND MARGARET RYAN, ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN, AND OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

OTIS R. BOWEN, M.D.,* INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND LINDA REIVITZ, INDIVIDUALLY AND IN HER CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, AND THEIR AGENTS, EMPLOYEES, SUCCESSORS IN OFFICE, ASSISTANTS AND ALL OTHERS ACTING IN CONCERT OR COOPERATION WITH THEM OR AT THEIR DIRECTION OR UNDER THEIR CONTROL, DEFENDANTS.

[Filed Aug. 14, 1986]

ORDER

Linda Reivitz, one of the defendants, has moved the court for a stay of this court's orders of July 16, 1986, and August 4, 1986, pending the defendants' appeal to the United States Supreme Court. Fed. R. Civ. P. 62(c) allows the court, in its discretion, to suspend an injunction during the pendency of an appeal. The court's July 16, 1986, order included a stay but the court, on its own motion, lifted that stay on August 4, 1986. The stay was lifted because the terms of the original order were ambiguous.

The court has considered the grounds raised by the defendant in support of the stay in light of the four factor test set forth by Judge Gordon in *Jordan v. Wolke*, 463 F. Supp. 641, 642. Defendant's motion for a stay will be granted.

IT IS THEREFORE ORDERED that the injunction granted by this court on August 4, 1986, shall be stayed pending the outcome of defendants' appeal to the Supreme Court.

Dated at Milwaukee, Wisconsin, this 14th day of Aug., 1986.

BY THE COURT:

/s/ JOHN W. REYNOLDS
John W. Reynolds
Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

C.A. No. 85-C-1600

JUDY LESKO, GEORGIA MASON, AND MARGARET RYAN, ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN, AND OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS,

v.

OTIS R. BOWEN, M.D., INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND LINDA REIVITZ, INDIVIDUALLY AND IN HER CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, AND THEIR AGENTS, EMPLOYEES, SUCCESSORS IN OFFICE, ASSISTANTS AND ALL OTHERS ACTING IN CONCERT OR COOPERATION WITH THEM OR AT THEIR DIRECTION OR UNDER THEIR CONTROL, DEFENDANTS.

[Filed Aug. 6, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendant, Otis R. Bowen, hereby appeals to the Supreme Court of the United States from the final Orders entered in this action on July 16, 1986, and August 1986.

The appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101.

Dated this 6th day of August, 1986.

Respectfully submitted,

JOSEPH P. STADTMUELLER
United States Attorney

/s/ BARBARA B. BERMAN
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Assistant United States Attorney

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-415
86-744

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LINDA REIVITZ, SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Appellant,

v.

JUDY LESKO, et al.,

Appellees.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

JUDY LESKO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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COUNSEL OF RECORD

December 9, 1986

QUESTIONS PRESENTED

1. Whether jurisdiction exists in this Court under 28 U.S.C. §1252 of an appeal from a district court preliminary injunction order, in which the district court found appellees likely to succeed on their claim that Section 402(a)(38) of the Social Security Act, 42 U.S.C. §602(a)(38) (Supp. II), is unconstitutional as applied to them.

2. If jurisdiction exists, whether the district court abused its discretion in preliminarily enjoining appellants from applying Section 402(a)(38) to appellees so as to require that, as a condition of eligibility for Aid to Families with Dependent Children (AFDC), parents must add to their AFDC filing unit children who receive child support or Title II benefits.

a. Whether the district court improperly balanced the hardships to appellees and appellants, including the effect on the public interest.

b. Whether there is adequate support for the district court's decision that Section 402(a)(38) is likely to violate appellees' rights under the Takings Clause, the Due Process Clause, and the Equal Protection Clause of the Fifth and Fourteenth Amendments.

c. Whether alternative grounds exist to support a finding that appellees are likely to suceed on the merits of their claim that Section 402(a)(38) should not be applied to them so as to require that, as a condition of eligibility for AFDC, parents must add to their AFDC filing unit children who receive child support or Title II benefits.

PARTIES TO PROCEEDINGS BELOW

In addition to the parties named in both captions, parties in the proceedings below are Georgia Mason, Margaret Ryan, their minor children, and other persons similarly situated.

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Griffin v. Richardson, 346 F.Supp. 1226 (D. Md. (1972), affirmed, 409 U.S. 1069 (1972) 21

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 18

Heckler v. Edwards, 465 U.S. 870 (1984) 12

Heckler v. Turner, 106 S.Ct. 1138 (1985) 24

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 27

Howell v. Bowen, 86-0677-L (D.R.I. Nov. 13, 1986) 23

Howell v. Trainor, 432 F.Supp. 1235 (N.D. Ill. 1977) 17

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Jimenez v. Weinberger, 417 U.S. 628 (1974)	20,21
Johnson v. Cohen, No. 84-6277 (E.D. Pa. Jan. 10, 1986)	11,18,23
King v. Smith, 392 U.S. 309 (1968)	24,27
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984)	21
Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982)	25
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Lesko v. Bowen, 639 F.Supp. 1152 (E.D. Wis. 1986)	15,17,22,23
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Maryland Dept. of Human Resources v. U.S. Dept. of Health and Human Services, No. M-86-605 (D.Md. Apr. 22, 1986)	12
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Morton v. Mancari, 417 U.S. 535 (1974)	25
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Paterson v. Paterson, 73 Wis. 2d 150, 242 N.W. 2d 907 (1976)	26
Posadas v. National City Bank, 296 U.S. 497 (1936)	25
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Short v. Heckler, No. C85-2248 (W.D. Wash. Jan. 6, 1986)	23
Spring v. Spring, 16 Wis. 2d 460, 114 N.W. 2d 807 (1962)	21

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White Horse v. Heckler, 627 F. Supp. 848 (D.S.D. 1985) 12,23,26

Constitution, Statutes and Regulations:

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U.S. Const. Amend. XIV 2,18

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Deficit Reduction Act of 1984, Pub. L. No. 98-369, §2640(a), 98 Stat. 1145, 42 U.S.C. §602(a)(38)(Supp.II) 3-4

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45 C.F.R. §233.20(a)(3)(ii)(D)	24

Other Authorities:

H. Conf. Rep. 98-861, June 23, 1984, U.S.Code Cong. & Adm. News, Vol. 3, 98th Cong., 2d Sess.	25-26
H. Conf. Rep. 99-841, 99th Cong., 2d Sess.	27-28
S. Rep. 99-313, 99th Cong., 2d Sess.	27
U.S. Code Cong. & Adm. News, Vol. 3, 98th Cong., 2d Sess. 1984,	25
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Nos. 86-415
86-744

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LINDA REIVITZ, SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Appellant,

v.

JUDY LESKO, et al.,

Appellees.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

JUDY LESKO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(a) appellees move to dismiss the appeals filed by both appellants. The ground for this motion is that the district court did not hold an Act of Congress unconstitutional, finding, instead, that appellees were "likely to prevail on the merits" of their claim that the Act is unconstitutional as applied to the discrete class of litigants before the Court. Therefore, jurisdiction is not present under 28 U.S.C. §1252.

Alternatively, pursuant to Rule 16.1(c) appellees move to affirm the district court decision on the ground that the questions upon which the preliminary injunction rests are so unsubstantial as not to need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §1252 provides, in pertinent part,

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

Section 402(a)(38) of the Social Security Act, 42 U.S.C. §602(a)(38) (Supp. II), provides, in pertinent part:

> A state plan for aid and services to needy families with children must --
>
> . . .
>
> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include --
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home

> as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter) . . .

STATEMENT

1. Statutory and Regulatory Framework

The AFDC program is a joint federal-state program established under Title IV of the Social Security Act, 42 U.S.C. §§601 et seq, (& Supp. II). The purpose of the program is to provide financial aid to dependent children. Federal law defines dependent children as needy children who have been deprived of parental support or care by reason of the death, incapacity, continued absence, or unemployment of a parent. 42 U.S.C. §§606(a) and 607.

Prior to October 1, 1984, individuals applying for or receiving AFDC benefits had the option of excluding any family member in the household from their application for benefits. The excluded members' needs were ignored in determining the amount of the AFDC grant to the family. Unless the excluded member had a legal duty of support toward a member of the AFDC household, any income or resources he or she had were likewise ignored in determining the amount of AFDC granted to the rest of the household.

In the 1984 session of Congress 42 U.S.C. §602(a) (Supp. II) was amended by §2640(a) of the Deficit Reduction Act, Pub. L. No. 98-369, 98 Stat. 1145. The amendment requires states participating in the AFDC program to amend their state plans to provide that:

> (a) A state plan for aid and services to needy families with children must --

> (38) provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include --
>
> (A) any parent of such child, and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter). . .

42 U.S.C. §602(a)(38). [Hereinafter cited to the Social Security Act, as Section 402(a)(38)]

Pursuant to Section 402(a)(38), the federal appellant adopted implementing regulations, now codified at 45 C.F.R. §206.10(a)(1)(vii). These regulations provide that:

> ...For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) Any natural or adoptive parent, or stepparent (in the case of States with laws of general applicability); and
>
> (B) Any blood-related or adoptive brother or sister.

The federal appellant has interpreted Section 402(a)(38) to require the inclusion of all full and half brothers and sisters within the AFDC group if they have an absent, deceased or incapacitated parent, without regard to the requirement that they also be needy. Furthermore, according to the federal appellant's interpretation, states are not required to determine whether the added children's income is legally or actually available to the other AFDC family members. Finally,

the federal appellant has interpreted the statute to specifically require the inclusion in the filing unit of children receiving child support or children's benefits under Title II of the Social Security Act, 42 U.S.C. §402(d) (& Supp. II).

The results for appellees differ, depending upon whether the added child's income is from Title II benefits or child support. If the income is from Title II, the AFDC grant for the family is reduced dollar for dollar by the amount of the Title II benefit.[1] If the child's income is from child support, the support is assigned directly to the state and the family receives a full AFDC grant plus $50 of the support which is returned to the family.[2]

2. Proceedings In This Case.

The state appellant promulgated a policy change in accord with the federal regulations in August, 1985. Appellees filed this action seeking to represent a class of parents and children in Wisconsin whose families contain children receiving AFDC benefits and children receiving child support or Title II benefits. Appellees requested a preliminary injunction to

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[1] A "full AFDC grant" in Wisconsin is presently set at 85% of Wisconsin's standard of need, not 100%, as federal appellant suggests in his Jurisdictional Statement at 3.

[2] The provision for returning to the family the first $50 of any child support payment was included in the Deficit Reduction Act of 1984 at §2640(b)(1), codified at 42 U.S.C. §657(b)(1) (Supp. II). Federal appellants suggest that by providing for the return of $50 in child support to the family, Congress sought to avoid the potential disadvantage of requiring child support recipients to be on the grant. This argument is disingenuous at best. Only if the child support being paid is quite low (about $135 per month based on an average AFDC increment in Wisconsin of $85 as family size increases from two to six persons) will this provision avoid the economic disadvantage. And, if the economic disadvantage is avoided then there is no point to the law at all: no money is saved in the AFDC program, and parents do not object to adding children, if the addition of a child is not to that child's financial disadvantage.

prevent appellants from conditioning receipt of AFDC benefits upon the inclusion in the AFDC filing unit of those children receiving independent income from child support or Title II. Appellees' factual presentation consisted of affidavits of four class members and an answer to interrogatories from the state defendant. See App., infra.

Appellee Judy Lesko lives with her two minor children, Ronald and April. App. A-1 through A-5. Her son Ronald receives $341 per month in Title II benefits due to the death of his father. Ms. Lesko and her other child are currently eligible for an AFDC grant of $417 a month. Because of the implementation of appellants' rule in Wisconsin, Ms. Lesko was informed that Ronald would be included within her AFDC filing unit and his Title II benefits would be budgeted against the family's AFDC grant. As a result, Ms. Lesko's monthly AFDC grant has been reduced to $167 a month, and the family's net monthly income has been decreased from $758 to $508 a month. This puts Ms. Lesko and her family well below the federal poverty line of $9,120 a year for a family of three.[3] Ms. Lesko's monthly expenses total approximately $790. Therefore, it is impossible for Ms. Lesko to adequately meet her family's needs. As of mid-December, 1985, she was unable to meet her gas, electric and rent bills, and she was without a working refrigerator. In addition, she is forced to use part of her son's Title II benefits for the support of herself and her other child, thereby depriving her son of the full benefits to which he is legally entitled and violating her duties as his representative payee.[4]

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[3] The current federal poverty guidelines are found at 51 Fed. Reg. 5105-06 (February 11, 1986).

[4] 20 C.F.R. §404.2035(a) and 42 U.S.C. §405(j) require that representative payees use Title II children's benefits for the benefit of the child beneficiary. Benefits are to be used for current maintenance, support of legal dependents, or invested on the beneficiary's behalf, in that order. 20 C.F.R. §§404.2040(a) and (c),

Appellee Georgia Mason's situation is similar. App. A-6 through A-10. She is also a single parent with two children. She is the representative payee for her son Raymond who receives $478 a month in Title II benefits due to his father's death. Ms. Mason and her other child are currently eligible for a monthly AFDC grant of $448. Ms. Mason's son Raymond has special needs resulting from serious emotional and behavioral problems. Because of these needs, which include a need for respite care, Ms. Mason has been spending his entire monthly Title II benefits on his current needs. If Raymond is included in her AFDC filing unit, the grant will be reduced to $49 per month and the family yearly income will be $6,324, considerably less than the poverty level of $9,120. Appellee Mason will be forced to use most of Raymond's Title II benefits for the rest of the family and will not be able to meet his needs. As a result, Ms. Mason is afraid that she may not be able to deal with Raymond's problems and that she may be forced to institutionalize him.

Appellee Margaret Ryan presents a somewhat different case. App. A-11 through A-13. She is a single parent with four children. Her two oldest children, Jolie and Stacie, receive child support payments of $500 per month from their father. Appellee and her other children are eligible for $533 a month in AFDC benefits. Ms. Ryan has been informed that because of the change in federal law she must add Jolie and Stacie to the family's AFDC grant and assign their child support payments to the state. Her monthly AFDC grant will be $745 for a family of five. She will also receive $50 of the assigned child support per month. Her monthly income will be reduced from $1033 to $795 a month, reducing the family's yearly income from $12,396 to $9,540 which is considerably below the poverty line of $12,880

4 Cont.

404.2045(a). Representative payees who do not so use the Title II benefits are subject to criminal penalties. 42 U.S.C. §408(e).

for a family of five. Ms. Ryan's daughters Jolie and Stacie are suffering from progressive hearing loss. If she is forced to include them within her AFDC grant, she will not have the funds necessary to meet their special needs and to help them cope with their handicap. Their child support monies, which are solely for their benefit, will be assigned to the state. Ms. Ryan fears that if this occurs Jolie and Stacie's father may seek a reduction of the child support order.

Class member Shirley Carr lives with her two minor daughters, Tondra and Kimberley, and her 18-year-old son. App. A-14 through A-16. Ms. Carr has been receiving $450 in Title II benefits for Tondra for approximately 13 years. She and her younger daughter have been receiving $453 in AFDC benefits. The federal law change resulted in a reduction in AFDC to $94, for a reduction in total family income from $903 to $544. Since the reduction, she has been unable to meet her basic monthly expenses, has had needed items repossessed, has been forced to sell furniture, and has not been able to purchase needed winter clothing for the children. She has also been forced to spend Tondra's Title II income on other family members, thus violating her representative payee duties.

Based on the Answer to First Interrogatory to State Defendants, App. A-17 through A-20, the district court found that in the first five months of implementation in Wisconsin, Section 402(a)(38) has affected over 3500 families with one or more children receiving Title II benefits or child support. These families previously had chosen to keep the independently supported children off their AFDC grants, presumably because to include them would not be to the children's financial advantage.[5]

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[5] It should be noted that where a child receives child support or Title II benefits that are less than the incremental increase in the AFDC grant, adding the child to the AFDC filing unit does not affect the independent income because the parent can continue to

The number of independently supported children affected was 5573, indicating that many of the families contain more than one independently supported child, as is the case, for example, with the Ryan family described above. The district court found the claims of named appellees to be typical of the class in granting appellees' motion for class certification.

The district court granted appellees' motion for a preliminary injunction finding that appellees would suffer irreparable harm if the motion were not granted, that the balance of harms tilted heavily toward appellees, that the public interest would be served by the preliminary injunction, and that appellees were likely to suceed on the merits of their claim. In its discussion of the likelihood of success, the court rejected appellees' arguments that the administrative regulations enacted by appellants were not consistent with the intent of Congress in enacting Section 402(a)(38), that they violated other provisions of the Social Security Act, and that they were in conflict with state laws governing child support. The court found, however, that appellees were likely to succeed on their claims that Section 402(a)(38), as applied to them, constituted a taking without just compensation and violated their rights to equal protection and due process under the Fifth and Fourteenth Amendments. A preliminary injunction was entered prohibiting appellants from applying Section 402(a)(38) to the class represented by appellees: AFDC families in Wisconsin which include one or more children with income from either Title II benefits or child support. The court stayed its order pending the outcome of this appeal.

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5 Cont.
spend the entire amount on the child, as well as the additional AFDC benefit which results from adding the child.

ARGUMENT

1. Jurisdiction Under 28 U.S.C. §1252 Should Not Be Assumed Over Direct Appeals Of Preliminary Injunctions Where A District Court Has Held Only That An Act Of Congress Is Likely To Be Unconstitutional As Applied To A Discrete Class Of Litigants Present Before The Court.

Appellants are seeking review of a preliminary injunction in which the district court found that the appellees are likely to prevail on the merits of their claim that, as applied to appellees, Section 402(a)(38) violates their constitutional rights. The district court in this case did not enjoin in its entirety the operation of Section 402(a)(38) on a nationwide basis and, therefore, this case is not one over which this Court has jurisdiction pursuant to 28 U.S.C. §1252.

In Walters v. National Association of Radiation Survivors, 105 S.Ct. 3180 (1985), this Court interpreted 28 U.S.C. §1252 to include review of preliminary injunctions which enjoin the operation of an Act of Congress "on constitutional grounds, across the country and under all circumstances." Id. at 3188. In Walters, the lower court preliminarily enjoined the Veterans' Administration from enforcing the $10 attorneys' fee limitation in all cases throughout the country, rather than limiting its order to affect a discrete class of veterans. The preliminary injunction entered in Walters enjoined a practice which had been in effect since 1862. Id. at 3190. Appellees here respectfully request this Court to limit the Walters jurisdictional holding to provide for direct Supreme Court review of those preliminary injunctions which find an Act of Congress likely to be unconstitutional on its face and which have application beyond the litigants before the court. Only then are the purposes of 28 U.S.C. §1252 served and the use of the resources of this Court justified.

The nature of preliminary injunctive relief and the standard for review of preliminary injunctions both support a narrow reading of Walters. It is well-settled that a district court decision granting preliminary injunctive relief based on a finding of likelihood of success on the merits is not tantamount to a decision on the merits. University of Texas v. Camenisch, 451 U.S. 390, 393-394 (1981); Brown v. Chote, 411 U.S. 452, 456 (1973). The standard of review of preliminary injunction orders is whether the district court abused its discretion in applying the preliminary injunction factors to the case before it, not whether the court's preliminary view of the merits will ultimately be the correct one. See Walters, 105 S.Ct. at 3197 (O'Connor, J. concurring); Camenisch, 451 U.S. at 398; Brown, 411 U.S. at 457; Doran v. Salem Inn, 422 U.S. 922, 931-32 (1975).

A decision of this Court to take jurisdiction here and rule on the district court's decision will resolve only the question of whether the court's decision was a "permissible choice," Brown, 411 U.S. at 456; Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 390 (7th Cir. 1984), given the facts presented by the plaintiffs before the court in the limited time afforded by the preliminary injunction process. Such a decision will not finally resolve the constitutional issue for the several other cases likely to reach this Court in which Section 402(a)(38) is being challenged on constitutional as well as statutory grounds.[6] "Where a district court simply has granted a

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[6] Two district court decisions on the merits have already reached this Court in cases challenging the constitutionality of the Act as applied to AFDC families with children receiving child support. Bowen v. Gilliard, No. 86-509 and Kirk v. Gilliard, No. 86-564 (consolidated and jurisdiction noted December 8, 1986) on appeal from the United States District Court for the Western District of North Carolina; Baldwin v. Ledbetter, No. C85-4340A, appeal filed October 17, 1986, from the United States District Court for the Northern District of Georgia. Another case on the merits is pending in the Third Circuit, Johnson v. Cohen, No. 84-6277 (E.D. Pa. January 10, 1986), appeal

preliminary injunction . . . barring enforcement of a statute as applied to certain individuals, the precedential effect is far more obscure. Such orders are based on a case-specific balancing of the equities that may well not carry over into other situations." Walters, 105 S.Ct. at 3204. (Brennan, J., dissenting).

Congress' purposes in enacting 28 U.S.C. §1252 are reviewed in Walters and in Heckler v. Edwards, 465 U.S. 870, 881-83 (1984).

> Congress sought to identify a category of important decisions adverse to the constitutionality of an Act of Congress -- which decisions, because the United States or its agent was a party, had implications beyond the controversy then before the court -- and to provide an expeditious means for ensuring certainty and uniformity in the enforcement of such an Act by establishing direct review over such decisions in this Court.

Walters, 105 S.Ct. at 3188. These purposes are simply not met in the case at bar in which the preliminary injunction order weighed the harm to a discrete class of litigants in having Section 40 (a)(38) applied to them and preserved the status quo pending a trial on the merits.

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6 Cont.

pending Nos. 86-1101, 86-1107, 86-1149 (3rd Cir.)

At least four Circuit Courts of Appeal have pending appeals on the merits of the application of the statute to AFDC families with Title II child beneficiaries. Creaton v. Heckler, 625 F.Supp. 26 (C.D. Cal. 1985) (denial of preliminary injunction), No. CV-85-3306-R (May 16, 1986) (decision on merits), appeal pending, No. 86-6148 (9th Cir.); Van Berg v. Shinpoch, No. C85-2069C (W.D. Wash. Apr. 18, 1986), appeal pending No. 86-3870 (9th Cir.); Oliver v. Ledbetter, 624 F.Supp. 325 (N.D. Ga. 1985), appeal pending No. 86-8037 (11th Cir.); Gorrie v. Heckler, 624 F.Supp. 85 (D. Minn. 1985), appeal pending No. 85-5394MN (8th Cir.); White Horse v. Heckler, 627 F.Supp. 848 (D.S.D. 1985), appeal pending Nos. 85-5005, 85-5006SD (8th Cir.); Britt v. Bowen, No. M-86-604 (D. Md. Apr. 16, 1986), appeal consolidated with Maryland Dept. of Human Resources v. U.S. Dept. of Health and Human Services, No. M-86-605 (D. Md. Apr. 22, 1986) and docketed Nos. 86-3076, 86-3083 (4th Cir.).

Neither would it be appropriate for this Court to attempt to give guidance to those lower courts considering similar cases, by assuming jurisdiction here and deciding the "probable" merits of the constitutional issue. As this Court said in Walters, "[j]udging the Constitutionality of an Act of Congress is properly considered 'the gravest and most delicate duty this Court is called upon to perform,. . .'" 105 S.Ct. at 3188 (citations omitted). Given the importance of the constitutional issues and the number of cases on the merits presently pending on appeal, appellees suggest it would be premature and unfair to litigants across the country for this Court to analyze the constitutional issues based on the limited record before the Court in this case.[7] Typical of preliminary injunctions, the decision in the case at bar was "determined through 'procedures that are less formal and evidence that is less complete than a trial on the merits,' and the parties [were] accorded neither 'a full opportunity to present their cases nor . . . a final judicial decision based on the actual merits of [the] controversy.'" Walters, 105 S.Ct. at 3200 (Brennan, J., dissenting) (citations omitted).[8]

A decision to limit jurisdiction under 28 U.S.C. §1252 to preliminary injunctions based on the facial unconstitutionality of Acts of Congress and the nationwide impact of preliminary injunction orders may be harmonized with prior decisions of this Court in which jurisdiction for direct review of preliminary injunctions has been found. In McLucas v.

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[7] The factual record is contained in Appendices 1-6, and is discussed supra in Statement, section 2.

[8] It should be pointed out that if jurisdiction is denied by this Court, the federal appellant is not foreclosed from pursuing his appeal in the Seventh Circuit; a notice of appeal was filed in the latter court on September 15, 1986, Case No. 86-2538. Further proceedings are being held in abeyance pending this Court's decision on jurisdiction.

DeChamplain, 421 U.S. 21 (1975), the lower court's decision had held an Act of Congress constitutionally defective on its face, and thus clearly was applicable beyond the particular litigants before the court. Additionally, assuming jurisdiction in that case did not require a decision on the constitutional issue based on a potentially inadequate record; the constitutional issue had already been decided by this Court in a prior case. Id. at 32. In Fleming v. Rhodes, 331 U.S. 100 (1947), this Court did find jurisdiction over a direct appeal of a preliminary injunction against the constitutionality of a federal statute as applied. However, that case arose under an earlier version of the direct appeal statute at issue here and was decided long before the mandatory jurisdiction of this Court was severely limited by the repeal of most of the Three Judge District Court Act. Act of August 12, 1976, Pub. L. No. 94-381, §§1, 2, 90 Stat. 1119.

In summary, this Court should dismiss this appeal for lack of jurisdiction. Assuming jurisdiction in this case will neither serve the purposes of Congress in enacting 28 U.S.C. §1252 nor resolve the many challenges to Section 402(a)(38) presently pending across the country.

2. If This Court Does Have Jurisdiction, It Should Affirm The District Court's Decision Summarily Since The Questions Upon Which The Decision Rests Are Unsubstantial.

The district court decided that appellees had met the standard for issuance of a preliminary injunction as set by the Seventh Circuit Court of Appeals. The "question presented," then, is not whether Section 402(a)(38) of the Social Security Act is constitutional, as appellants suggest in their jurisdictional statements. The question, instead, is whether the district court's decision represented a "permissible choice," given the facts presented by appellees and the balancing of equities required by the Seventh Circuit. See Brown v. Chote,

411 U.S. 452, 456 (1973); Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 390 (7th Cir. 1984).

The Seventh Circuit test for issuance of a preliminary injunction requires a district court to consider four factors:

> (1) [W]hether the plaintiff has an adequate remedy at law or will be irreparably harmed if the injunction is not granted; (2) whether the injury threatened to plaintiff outweighs the harm defendant will suffer if the injunction is granted; (3) whether plaintiff has a reasonable likelihood of success on the merits; and (4) whether granting the injunction will disserve the public interest.

Technical Pub. Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1138 (7th Cir. 1984). The court must weigh all factors together so that "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." Roland Machinery Co., 749 F.2d at 387. In other words, plaintiff must demonstrate "either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." Id. at 388, quoting from Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam). When the public interest is affected, as in the case at bar, that is to be included in the balancing of harms. Roland Machinery Co., 749 F.2d at 388. Using this test, the district court found that the balance of harms tilts heavily toward the appellees and that the public interest would be served by an injunction. Lesko v. Bowen, 639 F.Supp. 1152, 1157, 1159-60 (E.D. Wis. 1986), Federal J.S. at App. A. The Court also found appellees likely to succeed on the merits of their constitutional claims, even though a lesser showing is all that is required by the Seventh Circuit. Id. at 1157. E.g. Maxim's Ltd. v. Badonsky, 772 F.2d 388, 390-91 (7th Cir. 1985); Roland Machinery Co., 749 F.2d at 387-88.

The district court's order temporarily halts the application to appellee class of the new law requiring the addition of independently supported children to the family AFDC unit. The order thus serves the purpose of preliminary injunctions: it "preserve[s] the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981).

a. The district court properly balanced the harm to appellees, to appellants, and to the public.

Implementation of Section 402(a)(38) in Wisconsin requires AFDC parents to choose between adding their independently supported children to their AFDC family unit or foregoing AFDC altogether. The results of this choice are readily apparent. For families who have no income from employment, like the named appellees here, either all family members are forced to the level of an AFDC budget (85% of the state's standard of need and well below the poverty level),[9] or the family must live entirely on the income of the independently supported child -- either Title II benefits or child support. Either way, the heretofore separate income of the children receiving Title II benefits or child support must go to support other children in the family, and the standard of living of the independently supported children is drastically reduced to sub-poverty levels. The state appellant suggests in her jurisdictional statement that appellee families are no worse off than other AFDC beneficiaries and that such reductions in family incomes do not constitute irreparable harm. Such an argument ignores the substantial reduction in income to the independently

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[9] Those families with children receiving child support will keep an extra $50 per month above the AFDC benefit level.

supported children.[10]

The district court balanced against appellees' loss, the cost to the government of "temporarily restoring the plaintiffs' AFDC grants to their former level," and found the latter harm insubstantial in comparison. Lesko, 639 F.Supp. at 1157, Federal J.S. at 10a. Such a finding is well supported by other court decisions in which welfare expenditures have been balanced against the needs of welfare recipients and found to be less substantial. See e.g. Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. den. 424 U.S. 978 (1976); Moore v. Miller, 579 F.Supp. 1188 (N.D. Ill. 1983); Howell v. Trainor, 432 F.Supp. 1235 (N.D. Ill. 1977); Nelson v. Likins, 389 F.Supp. 1234, 1237 (D. Minn. 1974), aff'd 510 F.2d 414 (8th Cir. 1975).

In addition to the immediate harm faced by appellees, the irreparable nature of the harm is compounded by the bar against federal court orders for retroactive welfare benefits. Edelman v. Jordan, 415 U.S. 651 (1974). See discussion in Nelson, 389 F.Supp. at 1237.

The district court also found the public interest would be disserved by the application of Section 402(a)(38) to appellees, finding that it is important to fullfill parents' expectations that their children will be provided for out of their work effort, either directly through child support or indirectly through Title II benefits. Lesko, 639 F.Supp. at 1160, Federal J.S. at 16a. The court also noted the potentially

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[10] For example, appellee Mason's child formerly received $478 in Title II benefits on his deceased father's social security account. The effect of §402(a)(38) is to reduce his standard of living to approximately $175 per month (one-third of the family's $527 AFDC benefit level). Defendants have previously suggested that parents in such situations may continue to spend the Title II benefits on the child beneficiary and support the remainder of the family from AFDC. That would mean, in the Masons' case, spending $478 for Ronald and $49 for Ms. Mason and her other child, clearly not a realistic option.

divisive effect on families which Section 402(a)(38) may have, thus offending the public interest in family unity and stability. 639 F.Supp. at 1160, Federal J.S. at 16a. That these interests would be threatened is borne out by the record before the court and is noted by other courts considering Section 402(a)(38). Ryan Affidavit, App. A-11 through A-13; Mason Affidavit, App. A-6 through A-10. See e.g. Gilliard v. Kirk, 633 F.Supp. 1529, 1552, 1554, 1558-60, 1562 (W.D.N.C. 1986); Johnson v. Cohen, No. 84-6277, Slip Opinion at 16, 22-23 (E.D. Pa. Jan. 10, 1986).

b. Prior decisions of this Court afford a sound legal basis for the district court's decision that appellees are likely to succeed on the merits of their constitutional claims.

As discussed earlier, the burden on appellees to show they are likely to succeed on the merits is reduced once the court finds the balance of harms weighs substantially in appellees' favor. The test according to the Seventh Circuit is whether "serious questions are raised" on the merits. See discussion in section 2, above. The district court found appellees likely to succeed on the merits of their claims that Section 402(a)(38) deprived them of due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and also resulted in a taking without compensation under the Fifth Amendment.

The Due Process Clause of the Fifth Amendment prohibits the government from denying individuals equal protection of law. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). In the area of social welfare legislation, as recently reaffirmed by this Court, legislative classifications will be sustained "if the classification itself is rationally related to a legitimate governmental interest." Lyng v. Castillo, 106 S.Ct. 2727, 2730 (1986), quoting from United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973).

Section 402(a)(38) has the effect of dividing independently supported children into two classes: those who live in AFDC families and those who do not. For Title II child beneficiaries who do not live in AFDC families, representative payees are compelled by Title II statutes to spend the Title II child's funds for the use and benefit of the child. 42 U.S.C. §405(j). If the Title II child lives in an AFDC family, the result of Section 402(a)(38) is to release the payee from his or her obligation and, in effect, require that the beneficiary's income be spent on needy half-brothers and sisters. See Lesko, Mason, and Carr affidavits, App. A-2 to 3, A-9, and A-15. For child support recipients the result of Section 402(a)(38) is similar. Under Wisconsin law, child support is ordered to be paid by a parent for the benefit of that parent's children, §767.25, WIS. STATS. (1983-84), but when those children live in AFDC families, their income will, of necessity, go to support others in their family. See Ryan affidavit, App. A-13.[11]

Although the statute at issue here is an AFDC provision, its effect is to create distinctions among Title II and child support beneficiaries. Therefore, the classifications must be measured against the legislative purposes of Title II and state child support laws.[12] As against those purposes, the classification of Title II and child support beneficiaries

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[11] The effect on appellees is much greater than simply requiring all family members to share equally in household expenses. That was occurring before the law change. As appellees' affidavits make clear, the effect is to require the independently supported children to carry far more than their proportionate burden of household expenses.

[12] This distinguishes the case at bar from Lyng, supra, and Dandridge v. Williams, 397 U.S. 471 (1970). If Section 402(a)(38) simply resulted in a reasonable reduction of AFDC benefits to AFDC recipients, then the deficit - reduction purposes of the statute might be sufficient under standard equal protection analysis.

according to whether they live in poor families simply cannot survive.

The purpose of Wisconsin's child support laws is to minimize the financial effect of divorce or separation, by providing that absent parents must continue to support their children, considering the parent's ability to pay and the child's prior standard of living, §767.25(1m), WIS. STATS. (1983-84). That purpose is clearly not served by Section 402(a)(38) which takes the child support income by assignment and reduces the child's standard of living to an AFDC budget level. Except for the $50 returned to the family, there is no financial advantage gained from the absent parent's support. This Court has previously struck down classifications between child support recipients which did not serve the purposes of state child support laws. Gomez v. Perez, 409 U.S. 535, 538 (1973) ("[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.").

Title II benefits are intended to substitute for the direct support of a former wage-earner who is no longer able to provide for his or her children. Jimenez v. Weinberger, 417 U.S. 628, 633-34 (1974). The level of benefits is not determined by financial need, as in the AFDC program, but by the parent wage-earner's contributions and work history. 42 U.S.C. §§402(d) and 415. But, as with the child support recipients, the result of Section 402(a)(38) is to reduce the child's standard of living to an AFDC budget level. The wage-earner's past work effort no longer has any impact on the child's financial security, and the purpose of the Title II statute is not served. In a line of cases this Court has struck down classifications which resulted

in the reduction or elimination of children's Title II entitlements where the classifications were found to be unrelated to the purpose of the Title II children's benefit program. Jimenez v. Weinberger, 417 U.S. 628 (1974) (denial of Title II benefits to one class of illegitimate children does not serve the purpose of Title II, which is to provide for dependents of a disabled wage-earner); Griffin v. Richardson, 346 F.Supp. 1226 (D. Md. 1972), summarily aff'd, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F.Supp. 588 (D. Conn. 1972) (reduction of Title II benefits to certain illegitimate children is unrelated to the purpose of the law and to any legitimate legislative consideration), summarily aff'd, 409 U.S. 1069 (1972).[13]

In addition to depriving independently supported children of equal protection of the laws, Section 402(a)(38) constitutes a taking of private property for public use without just compensation. Clearly these children have protected property interests. Children receiving child support have a state-created right to support from their absent parents, based on common law. Spring v. Spring, 16 Wis.2d 460, 114 N.W.2d 807, 809 (1962). Children receiving Title II benefits also have a protected property interest. Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976). That the children's property is being taken without compensation is also apparent. See for example note 10, supra. Just compensation is generally the fair market value of the property. Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984). Finally, the property is being taken for a

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[13] This Court has stated that it is applying a "somewhat heightened review" standard in illegitimacy cases, Cleburne v. Cleburne Living Center, 105 S.Ct. 3249, 3255 (1985), but the language of the cases is not always consistent. This Court's stated reason for applying heightened review would also apply to appellees here: "[b]ecause illegitimacy is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'" Id. (citation omitted).

public purpose. As the district court pointed out in this case,

> [U]nder Wisconsin law there is no duty of support running from a minor child to his half-sibling. If there is no one who has both the legal duty and the financial capacity to support a child the public assumes the burden of that child's support through the AFDC program. [Section 402(a)(38)] transfers that burden substantially to those "other children" whose mother happens to have additional children who are now receiving AFDC benefits. Thus, the child who receives child support or Title II benefits and who has AFDC half-siblings is forced to assume a public burden which the child receiving the same benefits but who has no such half-siblings does not share.

Lesko, 639 F.Supp. at 1159, Federal J.S. at 13a-14a. The Fifth Amendment's guarantee "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960). See also Webb's Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (the Fifth Amendment is "a shield against the arbitrary use of governmental power").

The district court's decision that appellees were likely to succeed on the merits of their constitutional claims is soundly based on these prior decisions of this Court. It is apparent that this case raises "serious questions" of the constitutionality of Section 402(a)(38), satisfying the Seventh Circuit standard for the issuance of preliminary injunctions when the balance of harms weighs heavily in appellees' favor. Roland Machinery Co., 749 F.2d at 388. Since the standard is clearly met, the district court did not abuse its discretion, and the questions raised by the court's decision are unsubstantial.

c. Alternative grounds exist to support the court's decision that appellees are likely to succeed on the merits of their claim that Section 402(a)(38) should not be applied to their family situations.

The district court concluded that appellants' regulations, requiring the inclusion in AFDC filing units of children receiving child support or Title II benefits, "appear to implement Congress' intent" in passing Section 402(a)(38) of the Social Security Act. Lesko, 639 F.Supp. at 1157, Federal J.S. at 11a. In doing so the court rejected appellees' argument that Section 402(a)(38) need not be interpreted to apply to these children and that to do so was inconsistent with the language and purpose of the statutes governing the AFDC program. The court also rejected appellees' argument that Section 402(a)(38) conflicts with Title II of the Social Security Act and Wisconsin's family law scheme.

Several district courts have interpreted Section 402(a)(38) to not require the inclusion in the AFDC filing unit of children receiving child support,[14] Title II benefits,[15] or both,[16] thus avoiding the question of the statute's constitutionality.[17] This Court should consider a summary

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[14] Lee v. Pingree, No. 85-644 Civ-T-13 (M.D. Fla. Feb. 10, 1986) (granting preliminary injunction); Short v. Heckler, No. C85-2248 (W.D. Wash. Jan. 6, 1986) (granting preliminary injunction).

[15] Frazier v. Pingree, 612 F.Supp. 345 (M.D. Fla. 1985) (granting preliminary injunction); Howell v. Bowen, No. 86-0677-L (D.R.I. Nov. 13, 1986) (granting preliminary injunction).

[16] Gorrie v. Heckler, supra note 6; White Horse v. Heckler, supra note 6; Gibson v. Sallee, No. 3-85-1283 (M.D. Tenn. March 6, 1986) (granting preliminary injunction).

[17] Two district courts whose decisions for plaintiffs depend on statutory grounds, indicate that if Congress did intend this result, the statute raises serious constitutional problems. Gorrie, supra note 16, Howell, supra note 15. See also Johnson v. Cohen, supra note 6 (statute not unconstitutional per se but regulations must provide for a pre-deprivation hearing and a showing of availability to avoid an unconstitutional taking of property without just compensation).

affirmance here, based on a determination that the statutory analysis together with the constitutional analysis provide a reasonable basis for the district court's decision: that appellees are likely to succeed on their claims that the statute may not be applied to them.

The argument that Congress did not intend to require inclusion in AFDC filing units of children receiving child support and Title II benefits is grounded on the "availability principle," namely, that AFDC statutes and regulations limit consideration of income in computing AFDC grants to income which is actually available to the AFDC applicant or recipient. Under longstanding interpretations of this Court, 42 U.S.C. §602(a)(7)(A) prohibits the attribution of unavailable income to AFDC applicants or recipients. Heckler v. Turner, 106 S.Ct. 1138, 1147-48 (1985) (purpose of 42 U.S.C. §602[a][7][A] "is to prevent the States from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need"); Van Lare v. Hurley, 421 U.S. 338 (1975) (state may not reduce shelter allowance provided to AFDC recipient when a non-paying lodger resides in the home); Lewis v. Martin, 397 U.S. 552 (1970) (state may not reduce child's AFDC assistance by considering the income of male person assuming the role of spouse); King v. Smith, 392 U.S. 309 (1968) (state may not assume that man living with child's mother is a substitute father who meets the child's needs). Federal regulations incorporate the availability principle at 45 C.F.R. §233.20(a)(3)(ii)(D).

Provisions governing the Title II program limit the availability of Title II children's benefits. Title 42 U.S.C. §405(j) requires that Title II children's benefits be spent for

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17 Cont.

Decisions upholding Section 402(a)(38) on statutory and constitutional grounds are listed in federal appellant's Jurisdictional Statement to this Court in Bowen v. Gilliard, No. 86-509, Page 12, Note 3.

the benefit of the child beneficiary only. Under current federal regulations, once the child's current needs are met benefits may go toward the beneficiary's legal dependents, with any surplus invested on the beneficiary's behalf. 20 C.F.R. §404.2040(a) and (c), 404.2045(a). Furthermore, payees who do not use Title II benefits for the benefit of the child beneficiary are subject to criminal penalties. 42 U.S.C. §408(e). Applying Section 402(a)(38) to require the addition to the AFDC filing unit of Title II child beneficiaries poses a direct conflict with the Title II benefit scheme. Benefits statutorily limited to the use and benefit of Title II beneficiaries must be spent to support other family members. See Lesko, Mason and Carr affidavits, App. A-2 to 3, A-9, and A-15. In the absence of a direct amendment to the Title II statute, a repeal by implication must be found, and such repeals are strongly disfavored, Kremer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982). The intent of the legislature must be "clear and manifest" to uphold an implied repeal, Posadas v. National City Bank, 296 U.S. 497, 503 (1936), and the only permissible justification is when the two statutes are irreconcilable, Morton v. Mancari, 417 U.S. 535, 550 (1974).

The intent of Congress to repeal these Title II provisions is not clear. Federal appellant argues that Congress specifically considered child support and Title II beneficiaries in enacting Section 402(a)(38), Federal J.S. at 4, and relies on a Senate Finance Committee document which was not submitted to Congress with the proposed legislation. See U.S. Code Cong. & Adm. News, Vol. 3, 98th Cong. 2d Sess. 1984, p. 697 (no Senate Report submitted with the Deficit Reduction Act of 1984). It should not, therefore, be accorded much weight as an indication of Congressional intent. There is no mention of either child support or Title II in the Conference Report submitted with the bill. H. Conf. Rep. 98-861, 98th Cong., 2d Sess., June 23, 1984

at p. 1407, reported in 1984 U.S. Code Cong. & Adm. News, Vol. 3, p. 2095. Neither is the new statute's parenthetical reference to 42 U.S.C. §405(j) indicative of Congress' intent to include all Title II children in AFDC filing units. It may more readily be read to reverse the line of cases culminating in Cunningham v. Toan, 728 F.2d 1101 (8th Cir. 1984) (Title II benefits received on behalf of a minor parent may not be considered available to her child for AFDC purposes), vacated and remanded for further consideration in light of Deficit Reduction Act of 1984, 105 S.Ct. 896 (1985), opinion on remand, 762 F.2d 63 (1985). See discussion in White Horse v. Heckler, 627 F.Supp. 848, 855-56 (D.S.D. 1985).

As with Title II benefits, child support payments are also legally restricted to the use and benefit of the child beneficiary, §767.25, WIS. STATS. (1983-84) and Paterson v. Paterson, 73 Wis.2d 150, 242 N.W.2d 907, 910 (1976), and are therefore not available to support other family members. The amount of support is determined, principally, by considering the child's resources, the parent's ability to pay, and the standard of living the child would have enjoyed had the marriage not ended. Section 767.25(1m), WIS. STATS. (1983-84). The effect of Section 402(a)(38) is to abrogate this scheme for children living in AFDC households. For such children, regardless of their parents' ability to pay and their pre-divorce standard of living, their income will be reduced to an AFDC level plus $50. In order to find Congress intended this change -- to preempt state child support laws -- its intent must be clearly shown. Where state family law conflicts with a federal statute, it must be shown that Congress has "'positively required by direct enactment' that state law be preempted," and that the state law does "'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (citations omitted).

As discussed above, legislative history is not instructive. In addition, Wisconsin's child support scheme does not damage clear and substantial federal interests, as required by the Hisquierdo preemption analysis. The fundamental purpose of the AFDC program is to provide financial assistance to needy children not adequately supported by state-imposed child support laws. King, 392 U.S. at 332. For children who are receiving support, Section 402(a)(38) nullifies the benefits they derive from that support and reduces their standard of living. This directly contradicts recent efforts at both federal and state levels to increase child support awards and thereby remove children from welfare rolls. See, 1985 Wis. Act 29, Sections 2347-2411 amending Chap. 767, WIS. STATS. (1983-84); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305.

In summary, Section 402(a)(38) need not and should not be interpreted to diminish entitlements under Title II or state child support laws, because the intent of Congress to include children receiving these entitlements is not clear.[18]

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[18] Congress recently had the opportunity to state its intent with regard to children receiving Title II benefits or child support and chose not to do so in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. ___. The Senate version of the Tax Reform Act had contained a provision which would have "clarified" Section 402(a)(38) to expressly state that the provision applied to Title II benefits and child support. S. Rpt. 99-313, 99th Cong., 2d Sess., at 1074-75. The House had no comparable provision. In conference, the Senate language was eliminated, and the following language appears in the Conference Report:

> Standard Filing Unit. -- . . . The [conference] agreement does not include that portion of the Senate amendment concerning Title II benefits and certain child support payments. No inference is intended with regard to current Federal regulations implementing Section 402(a)(38) of the Social Security Act.

CONCLUSION

Appellees move the Court to dismiss these appeals, on the ground that Walters does not require a finding of jurisdiction under 28 U.S.C. §1252 where a district court has held appellees likely to succeed on the merits of their claim that a federal statute is unconstitutional as applied to them.

Alternatively, appellees move the Court to summarily affirm, on the ground that the district court did not abuse its discretion in granting a preliminary injunction under the Seventh Circuit standards as set forth in Roland Machinery Co., and therefore the question presented is unsubstantial. In order to clarify that a summary affirmance is not a decision on the merits of appellees' constitutional claims, the Court might specifically set forth that the affirmance intimates no view on the ultimate merits of appellees' constitutional or statutory claims.

The federal appellant draws this Court's attention to Bowen v. Gilliard, No. 86-509, and Kirk v. Gilliard, No. 86-564, cases in which this Court has now noted jurisdiction. Appellant suggests that the case at bar may present a better vehicle for deciding the constitutional questions presented, because appellees here include families with children receiving Title II benefits as well as children receiving child support, and the Gilliard cases involve only the latter. Appellees disagree with the federal appellant's analysis. The Gilliard appeals stem from a final decision on the merits. They thus do not pose the problems raised by this Court's plenary consideration of the case at bar: that of either a decision which provides too little guidance to other courts because of the limited review accorded preliminary injunction decisions, or a decision which resolves

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18 Cont.

H. Conf. Rep. 99-841, 99th Cong., 2d Sess., p. II-854. This result suggests, at minimum, a lack of Congressional consensus regarding the intended effect of Section 402(a)(38).

the important constitutional issues based on a premature record. For AFDC families containing Title II child beneficiaries, there are decisions on the merits in other jurisdictions which are likely to reach this Court soon, and which will provide the proper basis for review of the Title II question.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDY LESKO, et al.,

Plaintiffs,

vs.

MARGARET HECKLER, et al.,

Defendants.

'85 NOV 22 A11:14

AFFIDAVIT OF JUDY LESKO

Civil Action No. 85-C-915

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

I, JUDY A. LESKO, being first duly sworn on oath depose and state that:

1. I am an adult resident of the State of Wisconsin, County of Milwaukee and a plaintiff in this case.

2. I reside with my two children, Ronald, age 15 years and April, age 4 years.

3. Prior to September 1, 1985 my child April and I received $453 per month in AFDC benefits from the Milwaukee County Department of Social Services.

4. My son Ronald receives Social Security Old-Age, Disability and Insurance benefits (Title II benefits) in the amount of $341 per month due to the death of his father.

5. Ronald has been receiving Title II benefits for approximately 8 years. Because Ronald is a minor, the Social Security Administration appointed me to be his representative payee.

6. Ronald's Title II checks are sent directly to me. According to the instructions given to me by the Social Security Administration I must use his benefits solely for his needs and not for the needs of any other family member.

7. I use all of Ronald's monthly Title II benefits of $341 to meet his personal needs. Since Ronald is very tall for his age, he has special needs for food, clothing and shoes.

8. In August, 1985 I received a notice from the Milwaukee County Department of Social Services informing me that because of a new federal law, Ronald must be included in my AFDC grant. I was also informed that Ronald's Title II benefits will be budgeted against my AFDC grant.

9. As a result of this change, my family will now receive only $203 in AFDC which is the difference between an AFDC grant for a family of three ($544) and Ronald's Title II benefits ($341). This means that April and I will receive $260 less in AFDC each month.

10. The total monthly expenses for my family are as follows: Rent $225, food $275 (including $124 in food stamps), gas $125, electric $45, phone $27, clothes $75, transportation $50, laundry $30, miscellaneous $65.

11. This loss of income will cause extreme hardship to myself and my family. Since it is impossible for me to support April and myself on $203 per month I will be forced

to violate my duties as Ronald's representative payee and use his Social Security benefits to support the entire family. I am afraid that this could subject me to criminal penalties.

Dated at Milwaukee, Wisconsin, this 10-30-85 day of October, 1985.

Judy Lesko
JUDY LESKO

Subscribed and sworn to before me
this 30th day of October, 1985.

Shawn Caldwell
Notary Public, Milwaukee Co., WI.
My Commission ~~expires~~: is permanent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDY LESKO, et al.,

Plaintiffs,

vs.

MARGARET HECKLER, et al.,

Defendants.

AFFIDAVIT OF JUDY LESKO

Civil Action No. _____

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

I, JUDY A. LESKO, being first duly sworn on oath depose and state that:

1. I am a named plaintiff in the above-entitled case and have previously filed an affidavit with the Court, which was signed October 30, 1985.

2. Subsequent to my prior affidavit I have found my notice of decision dated August 13, 1985 which informed me that my grant amounts are less than those stated in my prior affidavit due to recovery of an overpayment which occurred about a year ago. Upto September 1, 1985 my AFDC grant was $417 instead of $453. Beginning September 1, 1985, my AFDC grant was changed to $167.

3. As a result of this reduction I have been unable to pay my gas and electric bills and I owe my landlord $60. I have also been unable to repair my refrigerator which stopped

working three days ago. My gas was turned off and I was only able to get it reconnected in November through the help of the federal energy assistance program which paid a portion of my bill.

4. I suffered a nervous breakdown in November which in my opinion was caused at least in part by the financial crisis that faces my family.

Dated at Milwaukee, Wisconsin, this 17 12.85 day of December, 1985.

JUDY LESZO

Subscribed and sworn to before me
this 17th day of December, 1985.

Notary Public, Milwaukee Co., WI.
My Commission expires: [illegible] 30, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDY LESKO, et al.,

Plaintiffs,

vs.

MARGARET HECKLER, et al.,

Defendants.

AFFIDAVIT OF GEORGIA MASON

Civil Action No. _____

STATE OF WISCONSIN)
) ss.
SAUK COUNTY)

I, Georgia Mason, being first duly sworn on oath depose and state that:

1. I am an adult resident of the State of Wisconsin, County of Sauk.

2. I live with my two minor sons, Donald Jerry, age 17 years; and Raymond Hiatt, age 16 years.

3. I receive AFDC for myself and my son, Donald, in the amount of $448.00 per month.

4. My son, Raymond, is entitled to Social Security survivor's benefits (Title II benefits) in the amount of $478.00 per month, due to the death of his father.

5. Raymond has been receiving Title II benefits for approximately 4 years. Because Raymond is a minor, the Social Security Administration appointed me to act as his representative payee.

6. Raymond's Title II checks are sent directly to me. The Social Security Administration has advised me that I am under a duty to use Raymond's Social Security benefits for his needs only and that I can face criminal punishment if I violate that duty.

7. I have been using Raymond's Title II benefits for his needs only, which include his one-third share of our family's shelter and utility costs.

8. Raymond has serious behavioral problems and has been diagnosed as hyperkinectic and emotionally disturbed.

9. Due to his emotional and behavioral problems, Raymond was institutionalized at county expense at a Marquette County group home from approximately 1977 to 1981, when he returned to my home.

10. Because of his condition, Raymond has special expenses which require the use of his entire Social Security check. He is destructive and is extremely hard on clothing, shoes and furniture. For example, I recently had to purchase him three new pairs of shoes in one month. I have also had to purchase him a new bed and dresser because he destroyed his old ones.

11. I am currently purchasing a small computer on credit for Raymond. He shows a great deal of interest in the computer. I have been able to treat his use of the computer as a reward and I believe it is responsible for Raymond's improved

behavior at home and greatly improved performance at school.

12. The monthly expenditure of Raymond's Social Security check breaks down approximately as follows:

Raymond's 1/3 share of mobile home payment	$ 47.92
Raymond's 1/3 share of mobile home lot rent	$ 24.00
Raymond's 1/3 share of electric bill	$ 22.00
Raymond's 1/3 share of fuel expense	$ 50.00
Raymond's J.C. Penney's charge account which includes payments on his clothing and his computer	$ 51.00
Raymond's life, accident and health insurance	$ 15.00
Raymond's respite care	$ 36.00
Gas for transporting Raymond to respite care, library and computer club	$ 20.00
Food	$ 56.00
Raymond's allowance	$ 40.00
Clothing	$ 30.00
Miscellaneous, including payment on Raymond's dental retainer, furniture, rental of computer discs, other activities	$ 76.08
Total	$478.00

13. In August, 1985, I received notice from the Sauk County Department of Social Services informing me that my AFDC grant will be reduced because Raymond receives Title II benefits. As a result of this change, Donald and I will receive only $49.00 in AFDC per month which is the difference between an AFDC grant for a family of three ($527.00) and Raymond's Title II benefits ($478.00).

14. I cannot support myself and my son, Donald, on $49.00 AFDC per month.

15. The total monthly expenses for myself and Donald, are as follows:

Mobile home payment	$ 95.84
Mobile home lot rent	$ 48.00
Electric bill	$ 44.00
Fuel bill	$100.00
Food	$133.00
Phone	$ 13.76
Miscellaneous	$ 13.40
Total	$448.00

16. This reduction in AFDC will cause extreme hardship for myself and my family. Since it is impossible for me to support myself and Donald on $49.00 per month, I will be forced to violate my duties as Raymond's representative payee and use his Social Security benefits to support the entire family. I am afraid that this could subject me to criminal penalties.

17. In addition, I cannot provide adequately for Raymond's special needs if I am forced to use his Social Security benefits for the subsistence needs of myself and my son, Donald.

18. I am afraid that if I cannot use Raymond's Social Security benefits to meet his special needs, I will be unable to control his emotional and behavorial problems in my home, which would mean that he may have to be re-institutionalized.

19. Raymond is doing relatively well in my home now on his current income and I want to keep him at home if

at all possible.

Dated at Baraboo, Wisconsin, this 7th day of November, 1985.

Georgia L Mason
GEORGIA MASON
Affiant

Subscribed and sworn to before me this 7th day of November, 1985.

John M. Pittman
Notary Public, State of Wisconsin
My Commission: Perm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDY LESKO, et al.,

Plaintiffs,

vs.

MARGARET HECKLER, et al.,

Defendants.

AFFIDAVIT OF MARGARET RYAN

Civil Action No. _____

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

I, MARGARET RYAN, being first duly sworn on oath depose and state that:

1. I am an adult resident of the State of Wisconsin, County of Milwaukee and a plaintiff in this case.

2. I reside with my four children, Jolie, age 11 years, Stacie, age 10 years, Angela, age 5 years, and Anthony, age 3 years.

3. Prior to September 1, 1985, Angela, Anthony and I received $533 per month in AFDC benefits from the Milwaukee County Department of Social Services and my daughters Jolie and Stacie received child support in the amount of $500 per month from their absent father, James Ryan. They have been receiving child support for over one year.

4. Jolie's and Stacie's child support checks were sent directly to me as their custodial parent by the Family Support Division of the Milwaukee County Clerk of Court's

Office.

5. According to my divorce decree, it is my understanding that I am required to use this money solely for the needs of Jolie and Stacie and not for the needs of my other children. Jolie's and Stacie's father, James Ryan, also does not want the child support money he pays to be used to support my other children.

6. I have been using all of the child support money to meet Jolie's and Stacie's personal needs.

7. In September, 1985 I was informed that because of a new federal law, Jolie and Stacie must be included in my AFDC grant. I was also informed that their child support payments will be assigned to the State. I never received a written notice regarding this change in the law.

8. As a result of this change, my family will begin to receive $745 per month in AFDC plus $50 in child support. This is a decrease in our total family income of $238 per month.

9. The total monthly expenses for my family are as follows: mortgage payment $540, food $350 (including $150 in food stamps), gas $50, electric $80, phone $30, clothes $50, transportation $60, laundry $30, miscellaneous $75. I also have outstanding debts, including $5000 in legal fees. The reduction in our total family income from $1033 to $795 per month will not allow me to meet these necessary expenses.

10. My daughters Jolie and Stacie will not benefit at all from being on the family's AFDC grant. Not only will they lose the $500 in child support they had been receiving each month, but they also have particular special needs which now will not be met. Jolie, Stacie and I have a progressive hearing loss due to a hereditary disease, otosclerosis. I am presently going deaf, and Stacie wears a hearing aid. We were advised to take sign language classes together with the rest of the family, but the decrease in the amount of our monthly income will make it impossible for us to do so. Jolie and Stacie may also be deprived of other special programs designed to help them with their handicap.

11. Given the fact that Jolie's and Stacie's child support is now assigned to the state and is being used to reimburse the state for the AFDC being provided to the entire family, I am afraid that my ex-husband will seek a modification of the child support order to reduce the amount to correspond with Jolie's and Stacie's share of the family AFDC grant. I do not want the support order reduced, especially since I intend to stop receiving AFDC entirely as soon as I am able. I am concerned that any dispute regarding the child support will disrupt my relationship with my ex-husband and will be detrimental to our children.

Dated at Milwaukee, Wisconsin, this _____day of October, 1985.

Margaret Ryan
MARGARET RYAN

Subscribed and sworn to before
me this 13 day of ~~October~~ November, 1985.

Notary Public, Milwaukee Co., WI.
My Commission expires: 10-15-89

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JUDY LESKO, et al.,

Plaintiffs,

vs.

MARGARET HECKLER, et al.,

Defendants.

AFFIDAVIT OF SHIRLEY CARR

Civil Action No. 85-C-1600

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

I, SHIRLEY CARR, being first duly sworn on oath depose and state that:

1. I am an adult resident of the State of Wisconsin, County of Milwaukee, and a member of the proposed class in this case.

2. I reside with my two minor children, Tondra, age 14 years, and Kimberly, age 9 years, and a son who is 18 years old.

3. Prior to September 1, 1985 my daughter Kimberly and I received $453 per month in AFDC benefits from the Milwaukee County Department of Social Services.

4. My daughter Tondra receives Social Security Old-Age, Disability and Insurance benefits (Title II benefits) in the amount of $450 per month due to the death of her father. She has been receiving Title II benefits for approximately

13 years. Because Tondra is a minor, the Social Security Administration appointed me to be her representative payee.

5. In August, 1985 I received a notice from the Milwaukee County Department of Social Services informing me that because of a new federal law Tondra must be included in my AFDC grant. I was also informed that Tondra's Title II benefits will be budgeted against my AFDC grant.

6. As a result of this change my family will now receive only $94 in AFDC which is the difference between an AFDC grant for a family of three ($544) and Tondra's Title II benefits ($450). This means Kimberly and I will receive $359 less in AFDC each month.

7. The total monthly expenses for my family are as follows: Rent $380, food $250 (including $175 in food stamps for a family of four), gas $100-$175, phone $27, clothes $ 50 , transportation $ 50 , laundry $ 25 , miscellaneous $20.

8. The loss in AFDC income has caused extreme hardship to myself and my family. Since it is impossible for me to support Kimberly and myself on $94 per month I have been forced to violate my duties as Tondra's representative payee and use her Social Security benefits to support the entire family. I am afraid that this could subject me to criminal penalties.

9. Because of the reduction in my monthly income I have not been able to meet all of my family's living expenses. I could not make the monthly payments on the family car or our washing machine and as a result both items have been repossessed by the companies I purchased them from. I have also been forced to sell household items, such as a television and chairs, in an attempt to cover monthly living expenses. I have not been able to buy my children all the winter clothing they need. Finally, I have not been able to pay the full amount of my gas bill.

Dated at Milwaukee, Wisconsin, this 18th day of December, 1985.

Shirley Carr
SHIRLEY CARR

Subscribed and sworn to before me
this 18th day of December, 1985.

Barbara Arias
Notary Public, Milwaukee Co., WI.
My Commission expires: 6-12-88

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JUDY LESKO, et al.,

Plaintiffs,

v.

MAREGARET HECKLER, et al.,

Defendants.

ANSWER TO FIRST INTERROGATORY TO STATE DEFENDANTS

Case No. 85-C-1600

Peter Carl Pawlisch, being first duly sworn on oath and in answer to plaintiffs' first interrogatory to state defendants, deposes and states that:

1. He is the Acting Deputy Director of the Bureau of Economic Assistance within the Department of Health and Social Services.

2. In that capacity, he has been authorized to answer or provide information leading to an answer to the following question:

> For the period from August 1, 1985 through December 31, 1985 please state the number of AFDC families in Wisconsin which include one or more children who receive independent income from child support or Title II benefits and who were not members of their family's AFDC group prior to implementation of the rule which is the subject of this lawsuit.

3. The answer to the question set forth in paragraph 2 can be derived from the attachments hereto which are incorporated by reference and which were prepared and submitted to me at my direction.

4. The attached materials are self-explanatory and

include the name, author and date of the document insofar as relevant to plaintiffs' inquiry.

5. Defendant Linda Reivitz does not appear to have in her possession or control any other documents which relate to the subject matter of the interrogatory.

Dated at Madison, Wisconsin, this 8th day of January, 1986.

Peter Carl Pawlisch

Subscribed and Sworn to before me
this 8th day of January, 1986.

Notary Public, State of Wisconsin
My Commission: expires 6-11-89.

1/6/86

To: Pete Pawlisch
Administrative Assistant, BEA

From: Ed Mason, OM1-DCS

Re. Info. due 1/6/86 for First Interrogatory to State Defendants In Lesko Vs. Heckler.

After Angelica Bilkey, Susan Wood and I discussed the above data request from you, Don Jons and others, it was decided to secure the data as follows:

1) find Soc. Sec#'s of all people outside the AFDC group in active AFDC cases as of June 30, 1985 who were receiving either Title II SSA or Child Support funds.

2) test the above individuals to see if they were within the AFDC group as of August 31, 1985 after DEFRA was implemented in Wisconsin.

a) test further to see if individuals from 1) appeared within the AFDC group in September, October, November, or December 1985.

Per my 12/27/85 note to you, it can be assumed that any persons found to have shifted from 1) to 2) above are the ones affected by DEFRA. If you have any questions about the two tables attached, please call me at 266-9387.

cc. Angelica Bilkey
Joe Gale
Greg Smith
Susan Wood

Table 1: AFDC cases with one or more children receiving independent income from child support and/or SSA Title II prior to DEFRA.

First month receiving aid					
Aug 85	Sep 85	Oct 85	Nov 85	Dec 85	TOTALS
3080	218	108	101	48	3555

Table 2: AFDC recipients receiving independent income from child support and/or Title II prior to DEFRA.

	First month receiving aid					
	Aug 85	Sep 85	Oct 85	Nov 85	Dec 85	TOTALS
Title II only	4229	172	78	66	35	4580
Child Support only	680	117	76	64	25	962
Both of above	25	1	2		3	31
TOTALS	4934	290	156	130	63	5573

Prepared by:
Richard Stueber
OMI - DCS
Rm 453, 1 W. Wilson St.